SUPPLEMENT TO
McCAUL
ON THE
REMEDIES
OF
VENDORS and PURCHASERS
OF REAL ESTATE

SECOND EDITION

Bringing Case Law up to the 1st of January, 1918.

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SUPPLEMENT (1918)

McCaul on "Remedies of Vendors and Purchasers"
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Since the second edition of this book was issued in January, 1915, there have been a number of important decisions, especially of the Judicial Committee, that make it advisable that some supplementary notes should be published to bring the book up to date.

At the same time I have taken advantage of the opportunity to correct a few typographical errors and to add some additional references. The page where the subject matter of these notes is dealt with in the body of the book, is indicated in the margin of the supplementary chapter.

I have also, by permission of "The Canadian Law Times," re-printed my article on "Options."

The pagination of this supplement is continued on consecutively from page 222 of the 1915 edition, and I have added a supplementary index, and table of cases.

I have to thank Mr. A. R. Belcher, Student-at-Law, for preparing the index and table of cases.

C. C. McCAUL.

Edmonton.

June, 1918.

TABLE OF CASES CITED

CHAPTER IX.

Options.*

In *Carey* v. *Roots*,[1] Simmons J., quotes Williams on Vendors & Purchasers, and refers to *London and S. W. Ry.* v. *Gomm*,[2] in support of the proposition that an option-contract creates an interest in land; and that it is within the purview of the 4th section of the Statute of Frauds; and he approves of the practice of registrars under the Land Titles Act registering *caveats* in respect of such "options."

In *Woodall* v. *Clifton*[3] it was held by the Court of Appeal that an option to purchase the fee simple contained in a lease did not come within the statute 32 Hen. VIII., ch. 34, so as to make the liability run with the reversion. The first sentence in the judgment of the Court (per Romer, L.J.), is:—

"A contract in a lease giving an option of purchase might be good, without regard to the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease."

These citations indicate the most interesting subjects for discussion in connection with options: whether any interest in land is created, and if so its nature and incidents; whether an "option" can be assigned: how far the benefit or burden is transmitted to executors and administrators: how far, where the option is in a lease, the covenants run with the land, and kindred and subordinate questions.

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[1] 5 A. L. R. 141.

[2] 20 Ch. D. 562.

[3] [1905] 2 Ch. 257.

PART I.

(a) *Definitions, &c.*—It is much easier to describe and explain what an option is and what it is not, than to give an exact definition of it. The neatest definition that I have run across is that given by Cameron, J.A., in *Paterson* v. *Houghton*,[4] (approved in *Carey* v. *Roots*,[5]): "An option is defined to be a right acquired by contract to accept or reject a present offer within a limited, or it may be a reasonable, time in the future."

A contract for the sale and purchase of land, like any other contract, can be reduced to an *offer* on one side, and its *acceptance* on the other. Until accepted the offer can always be revoked. If, however, for valuable consideration moving from the offeree, the offeror agrees to make his offer irrevocable for a given period in the future, we have an "*option*," or better, an "*option-contract*."

The elements of the matter are very simply stated in Anson on Contracts: 'A promise to keep an offer open would need consideration to make it binding and would only become so if the party making the offer were to get some benefit by keeping it open. The offeree in such case is said to "purchase an option"; that is the offeror in consideration usually of a money payment, binds himself not to revoke his offer during a stated period.'

The "option" itself is a contract, viz.: an agreement to keep the offer open for a specified period—and consequently like any other contract requires a *consideration* to support it.

It is solely this quality of irrevocability, founded upon consideration, that distinguishes an option from an ordinary offer. Even the right which the option holder is said to have to "exercise his option," i.e., to elect to accept

[4] 19 Man., at p. 175.

[5] 23 W. L. R., at p. 892: 5 A. L. R., at p. 136.

or decline the offer, is not the distinguishing feature of the option contract; for until a mere offer is revoked, the offeree has got exactly the same right of exercising his option: in like manner he can elect to accept or decline the offer. While this may seem very elementary, it is of importance to emphasize the point in connection with the subjects to be discussed in part 2 of this chapter.

It is sometimes said that an option is a unilateral contract. This does not appear strictly correct; each party gains an advantage, the offeror gets money or its equivalent; the offeree acquires a valuable right.

In a Montana case,[6] it is rather neatly put: "An agreement in writing to give a person the 'option' to purchase lands . . . is simply a contract by which the owner of property agrees with another person that he shall have the right to buy his property at a fixed price within a certain time. He does not sell his land; he does not then agree to sell it; but he does sell something; that is the right or privilege to buy at the election or option of the other party. The second party gets *in praesenti*, not lands, not an agreement that he shall have the lands, but he does get something of value; that is the right to call for and receive the lands if he elects."

(b) *Parties.*—Generally speaking any party who is competent to enter into an ordinary contract may be a party to an option agreement.

An exception, which at first blush seems rather curious, is made in the case of executors, administrators and trustees.

In *Oceanic Steam Nav. Co.* v. *Sutherberry*[7] Jessel M.R. (James, L.J., and Lush, L.J., concurring), states:— "but the question is not whether this was a proper rent,

[6] *Ide* v. *Parker*, 24 Am. St. Rep. 17.
[7] 16 Ch. D. 236.

but whether it was right to insert an option of purchase so as to fetter the exercise of the trust for sale by preventing the administrator from selling the property to anyone but the plaintiff for a period of seven years at a price then fixed. It appears to me it would be dangerous to hold that an administrator could do this, a mere trustee whose duty is to sell within a reasonable time. In the case of an ordinary trustee it is clear that no such option could be given by him; . . ."

This case was followed in Alberta in *St. Germain* v. *Reneault*.[8]

In this case, the defendant Evelyn Reneault was a widow, the administratrix of the estate of her deceased husband. In her capacity of administratrix she granted a lease of certain premises to one Boudreau for a period of seven years, the lease containing a clause granting an option to the lessee to purchase the property at a fixed price at any time during the currency of the term. The action was brought by one of the next-of-kin against the administratrix and the lessee, the other next-of-kin being added as parties defendant, claiming a declaration that the option to purchase was void as being a breach of trust. In spite of secs. 54, 76 and 135 of the Land Titles Act (which were relied upon by the defendant-lessee), the Court held that the case was governed by the judgment in *The Oceanic Steam Navigation Co.* v. *Sutherberry* above cited. A curious aftermath of this case was the case of *Boudreau* v. *Reneault*,[9] in which the lessee instituted an action against Evelyn Reneault, the widow and administratrix of the deceased, claiming specific performance of the option to the extent of the widow's interest in the estate, namely, one-third, and an abatement to the extent of the other two-thirds. It was held on appeal by the Court *en banc* affirming the judgment of the trial judge—though on different grounds—

[8] 2 A. L. R. 371.
[9] 3 A. L. R. 333.

that the difference between an undivided one-third interest in a general estate of which the property agreed to be sold is only part, and the whole interest in the specific property covered by the agreement, is so great that it removes the case altogether from the application of the *cy-près* doctrine.

Real Estate Brokers, Attorneys, &c.—Where and under what circumstances a real estate broker employed to sell property has power to enter into a binding agreement of sale on behalf of his client, is a somewhat vexed question; it is submitted, however, that at least the broker cannot grant an option (unless expressly authorized by his client), and that the principle of *Oceanic Steam Nav. Co.* v. *Sutherberry* applies to him[10] as well as to an ordinary attorney with the usual power to manage, lease and sell.

The law in the United States is thus summarised in the editor's note to *Trogdon* v. *Williams*[1]:—

'The general rule that a power to sell real estate must be strictly followed in order to bind a principal, applies when the agent attempts to bind the principal by an option on such real estate, if such right is not expressly given in the power to sell. And the few cases that have passed upon the matter hold, as does *Trogdon* v. *Williams*, that an option under such circumstances is not binding on the principal.'

It is true that in *Mathewson* v. *Burns*[2] Boyd, C., says: "Next and last as to the power of the agent to enter into a contract giving the option to purchase. He acted under a power of attorney most comprehensive in its terms: power was give to let, set, manage and improve the lands: to sell and absolutely dispose of the lands 'as and when he shall think fit: he shall execute and do all such things as he shall

[10] It is expressly so held in an American case, *Tibbs* v. *Zirkle*, 55 W. Va. 49: 104 Am. St. Rep. 977.

[1] (N. Car.) 10 L. R. A. (N.S.) 867.

[2] 12 D. L. R. 236; 4 O. W. N. 1477.

see fit.' . . . *These ample powers per se would cover selling by way of option, during the term, at a fixed price.*"

The proposition italicised (by me) was not necessary to the decision, and should, it is submitted, be regarded as *obiter dictum*. The learned Chancellor points out that "Burns was told of this very arrangement with the plaintiff, and in fact ratified it by his letter of the 11th May, 1910." No reference seems to have been made to the *Oceanic Steam Nav. Co.* v. *Sutherberry* case, or it foundational principle.

(c) *Form and Construction of Option-Contracts.*—In its simplest form an option-contract may be expressed in language such as this: 'I, A. B., in consideration of $100, hereby grant to C. D. an option to purchase within ten days from date my land—Whiteacre (describing) for the sum of $10,000.'

If at any time before the expiration of the limited period, C. D. simply notifies A. B. that he accepts the offer, the option-contract is at an end, and is replaced by a complete and binding agreement of sale.

It is important to observe that under such simple conditions, the agreement constitutes an *open* contract, which is usually more advantageous to the purchaser than even the ordinary form of agreement used by conveyancers. Consequently, when the owner of the land, granting an option—in view of its contemplated acceptance—wishes to attach any express conditions or provisoes to the resulting agreement of sale, it is necessary to stipulate accordingly in the option-contract.[2] This can be done by annexing a form of agreement of sale to the option-contract, and providing that it shall govern in case of acceptance—or it can be provided that in case of acceptance the parties should enter into an "*ordinary*" agreement of sale—though it is

[2] See Dart on V. & P. (7th Ed.) 274.

obviously to the advantage of the vendor to specify the exact terms of the resulting contract.

If the option-contract contemplates the drawing up of a formal agreement of sale, the rule is that there is no actual contract of sale between the parties until it is drawn up, executed and delivered. But it is important to observe the variations and exceptions to the rule.

In *Winn* v. *Bull*,[4] Jessel, M. R., states the rule:—"Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared."

In *Chinnock* v. *Marchioness of Ely*,[5] Lord Westbury says:—"But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

This is approved in *Rossiter* v. *Miller*,[6] and amplified and explained by Lord Blackburn. He says:—"It is a necessary part of the plaintiff's case to shew that the two parties had come to a final and complete agreement, for if not there was no contract. So long as they are only in negotiation either party may retract. . . . But the mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared embodying the terms which shall be signed by the parties does not by itself shew that they continue merely in negotiation . . . but as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

[4] 7 Ch. D. 29.
[5] 4 DeG. J. & S. 638.
[6] 3 App. Cas. 1124.

Again, the parties may act on the terms in the option-agreement as if, after acceptance, it were the complete agreement of sale, so as to effect on both sides a waiver of the term providing for the drawing up and execution of a formal contract. This is very well illustrated by the Manitoba case *Munroe* v. *Heubach*.[7]

Again, the option agreement may be so drawn, that the agreement of sale resulting from acceptance is only to come into effect, upon the investigation and proof of title, inspection of lands, or payment of purchase-money, or all or some of these conditions. Even the option-contract itself may be so drawn as not to come into effect, except subject to similar conditions precedent, as in *McKinley* v. *Frank*,[8] though that case might have been decided against the plaintiffs on the ground of their cancellation of the option, which the defendant was permitted to plead at the trial by way of amendment to his defence.

As to actual payments of moneys being a condition precedent to establishment of the relationship of vendor and purchaser, even on an executed agreement of sale, see *Knight* v. *Cushing*.[9]

An agreement purporting to be, and even expressly called, an "option," may be found in reality, to be an agreement of sale, when its substance is examined—so as not to exclude it from the operation of the doctrine of relief against forfeiture.

In *Jones* v. *Morris*,[10] the facts of which are too complicated to state at length, Stuart, J., says, after reciting the so-called "option" agreement—"The defendant contended that it was an option, strictly so-called, and that as the plaintiff had not exercised his rights under it by the time

[7] 18 Man. 450; 8 W. L. R. 785; 10 W. L. R. 196.
[8] 11 W. L. R. 571; 12 W. L. R. 498.
[9] 46 S. C. R. 555.
[10] 12 W. L. R. 651.

limited therein, h ad lost them entirely. The plaintiff contended that it was nothing more or less than a substantive agreement for sale. . . . The agreement before me must be interpreted just as any other agreement. It is absurd to ask the Court to say, first, that it is what is called an option, and then use that catch-word as an aid to interpretation. The interpretation of the words and meaning of the agreement must come first. The result of this may be that it is discovered to be an option strictly so-called or it may be that, while it presents many features of such an option, some particular elements are lacking; or that, owing to the presence of some particular elements in the agreement, while it may present many features of an option, yet the strict rules which are generally considered applicable to an option cannot in justice be applied in the case."

The judgment resulted in the "option" being treated as an agreement of sale, and, on the principle of relief against forfeiture, the plaintiff was awarded specific performance, in spite of his default in compliance with the terms set out in the agreement, viz.: "The *option* hereby given shall be open for acceptance up to, but not after the 15th July, 1909, and shall be accepted by payment of the said amounts in full on or before 12 o'clock noon on that date. Time shall be of the essence of this agreement."

On the same principle, no doubt, the converse is true, and an instrument drawn in the form, and expressly called, an "agreement of sale," may similarly when its substance is examined, be found in reality to be only an "option."

The following case has been submitted to me for opinion:—

" December, 1913.

Agreement of sale bet A." (of so-and-so), Broker, and "B." (of so-and-so), Gentleman, entered into this 20th day of December, 1913, by which "A."

agrees to sell to "B." one-half interest in (certain lands) for the following consideration, namely:—

$20,000 to be paid as follows: The sum of $10,000, on or before December 31st, 1913; the sum of $5,000, on or before June 30th, 1914; the sum of $5,000, on or before December 30th, 1914. On receipt of the final payment, the said "A." will deliver and transfer to "B." a legal transfer and assignment of one-half interest in the above property. *The said "A." further agrees that after the expiration of two years from date, should "B." wish to withdraw his interest from the said property, "A." will return all moneys received from "B." without interest*, providing "B." assigns and delivers to "A." all his interest in the said property."

Under this agreement "B." made the first payment of $10,000—on or before December 31st, 1913. The instalment of $5,000—to be paid on June 30th, 1914, was not paid, nor was the instalment of $5,000—falling due on December 31st, 1914.

In the interval between June 30th, 1914, and December 31st, 1914, "B." began an action to set aside the agreement on the ground of misrepresentation—*innocent* misrepresentation. The action was dismissed. See *Cromwell* v. *Morris* (No. 1), 32 W. L. R. 289.

The trial judge gave judgment in favour of "A." on his counterclaim for $7,500—the payment that fell due on the 30th June, 1914. See *Cromwell* v. *Morris* (No. 1), 32 W. L. R. 289.

Prior to the judgment being entered "A." filed and served a notice of abandonment of his counterclaim, and has since notified "B." that unless the two instalments of $5,000 each—which fell due respectively on the 30th June, 1914, and on the 31st December, 1914, are paid within fifteen days, that the "*option*" contained in the agreement of the 20th December, 1913 will be at an end, and finally

determined, and that he "A." will retain the $10,000—already paid to his own use.

Suppose at any time after the 20th Decem[illegible] 1915—that is, after the expiration of two years from the date of the agreement, "B." brings an action against "A." to recover the $10,000—paid by him, can "A." successfully defend the action on the ground that the agreement in question was, in effect, a *two years' "option,"* and that time was strictly of the essence, and since "B." had not complied with the terms and conditions of the option, and had made default in the payments to be made on the 30th June, 1914, and the 31st December, 1914, he has no further rights under the agreement?

This case will doubtless come before the Alberta Courts for consideration within a short time.*

(d) *The "Exercise" of an option, or "Acceptance,"—*

(a) Time within which option must be "exercised."

The option-agreement itself nearly always defines the time for, and often the method of "acceptance," or as sometimes expressed "the exercise of the option." Remembering that an option-agreement is simply an offer irrevocable for the limited period, it is obvious that logically the *option* is just as truly 'exercised' by non-acceptance as by acceptance of the offer. The usual meaning, however, attached to the expression "exercise of the option" in an option-agreement, is equivalent to "accept the offer." Thus in *Lawrence* v. *Pringle*,[1] Macdonald, C.J.A., (B.C.) says: "The agreement is inartistically drawn, and some confusion arises by reason of the phrase 'acceptance of the option' being sometimes used and at other times the phrase "exercise of option." It is however, clear to my

* This case did come before the Courts but went off upon entirely different points: See *Cromwell* v. *Morris*, W. W. R. 1917 (vol. 1, p. 460); W. W. R. 1917 (vol. 2, p. 374).

[1] 21 W. L. R. 546.

mind that 'acceptance' of the option means the election of the plaintiffs to buy the property on the terms specified, and that 'exercising the option' means the same thing."

Where no time for acceptance is defined, it is said that the option is open for, and must be accepted within a reasonable time: *Cunningham* v. *Stockham*[2]; *Carey* v. *Roots*.[3]

This, however, requires analysis: is the limitation of a definite period of time within which the offer is *irrevocable* essential to the definition of "option"? or, on the other hand, may an option be open for an unlimited period?

Both the above cases could have been decided on the ordinary principles of the law of contract, without any special reference to "option" at all. An ordinary offer, until revoked, can always be accepted within a reasonable time, and if so accepted the contract between the offeror and the offeree is complete. "There is, of course, no such thing as a reasonable time in the abstract. It must always depend on circumstances": *Hicks* v. *Raymond*.[4]

In *Cunningham* v. *Stockham* (*supra*), the defendant on the 4th September, 1908, offered to sell his timber limits to the plaintiffs at $1.50 per acre, and if accepted, $2,000 was apparently to be the "cash payment," the balance in 2, 4, and 6 months. On October 23rd, 1908, the plaintiff, in effect, accepted the offer by tendering the $2,000. The *offer* had not been revoked and it was just a simple question, apart altogether from "option" or no "option," whether the acceptance was in reasonable time.

The trial judge held it was not. He says: "But no time was specified in which that acceptance should be notified, therefore I take it that meant a reasonable time. . . . but I do not think, having regard to the nature of timber dealings, that the 23rd would be a reasonable time."

[2] 15 B. C. R. 141.
[3] 5 A. L. R. 141.
[4] [1893] A. C. 22.

The judgment was affirmed, but Martin, J., dissenting, says: "I think the option was duly accepted, and so far as payment is concerned it became only a question of reasonable time and there could be no cancellation without reasonable notice."

I have not referred to the provision in this case (which must undoubtedly have aided the Court in determining reasonable time for acceptance) that the offeree was to have 30 days to cruise the limits, because the point is this—the whole question could have been determined on the elementary law of contract. See Anson on Contracts, 13th ed., p. 39. *Ramsgate Hotel Co.* v. *Montefiore.*[5] Note also that in this case the consideration for the option—one dollar—could hardly be deemed more than merely nominal.

So in the Alberta case—*Carey* v. *Roots* (*supra*), when the consideration for the option was $10—the question was really whether the acceptance on January 20th, 1912, of an offer made on November 25th, 1911, and not revoked, was within a reasonable time—under all the circumstances of the case. It had really little or nothing to do with the fact that the offer was contained in an option-agreement.

Dart on Vendors & Purchasers, puts the matter in this way: "Where the contract fixes no date for the exercise of the option, the Court will try to discover from the terms of the agreement and the circumstances of the case the intention of the parties. If the option has not been exercised by the date at which the Court is of opinion that it was intended to be exercised, neither party can enforce it (citing *Wentworth* v. *Hull & N. W. J. J. Co.*[6]). But the Court cannot import a limit where none can be discovered from the terms of the contract."

This last proposition is not borne out by the authority cited, namely, *London and South Western R. W. Co.* v.

[5] L. R. 1 Ex. 109.

[6] (1891) 64 L. T. 190.

Gomm.[7] It is expressly pointed out in this judgment that the period for exercising the option was not merely unlimited, but that it was expressly made unlimited to suit the circumstances surrounding the contract.

Perhaps the true meaning to be attached to the statement that, where no time is specified the option is open for acceptance within a reasonable time, is this, that if a man "purchases an option" and no time is limited, the vendor cannot revoke his offer, without reasonable notice to the purchaser; but it is submitted that by notification to the purchaser he could make time strictly of the essence. "Though time may not originally have been of the ence of the contract, either party may, if there has been s e default or unreasonable delay by the other party, by proper notice, bind the other party to complete within a reasonable specified period." Dart on V. & P. (7th ed.), 500. 501.

If this be correct, then the distinction between reasonable time for acceptance in the case where a man "purchases an option" and in that where a mere offer is made to him, may be stated to be this: in the case of a mere offer the offeror may revoke it at any time before acceptance; in the case of an option the offeror cannot revoke the unaccepted offer without notice in the meaning of the above quotation from Dart.

This view is strongly supported by the decisions and reasoning in the following cases[8]: *Hersey* v. *Giblett*;[9] *Moss* v. *Barton*[10]; *Buckland* v. *Papillon*.[1]

[7] 20 Ch. D., at p. 580.

[8] It will be noted that all the above cases were instances of the option being contained in a lease, and possibly different considerations may apply to what, for convenience, may be called an "option at large" or "*en gros*."

[9] 18 Beav. 174.

[10] 1 Eq. Cas. 474.

[1] L. R. 2 Ch. 67.

Where time is specified for acceptance, either by the terms of the option-contract or by subsequent notice, the rule is that it is strictly of the essence: *Dibbins* v. *Dibbins*;[2] *Paterson* v. *Houghton*.[3]

In fact all the conditions imposed on the exercise of the option are strictly construed. Dart (7th ed.), 272, *Archdekin* v. *McDonald*.[4] But there may be circumstances surrounding the transaction that may induce the Court to hold time not to be essential, as pointed out by Stuart, J., in *Jones* v. *Morris*.[5] Again the vendor may by his conduct have raised an equity against himself which will estop him from asserting that the option has expired: *Bruner* v. *Moore*.[6]

(b) *Method of Acceptance.*

Acceptance of the offer must of course be communicated to the offeror, and must be unequivocal.[7] To bind the vendor to the contract, the acceptance need not be in writing. "An offer containing the names of the parties and the terms of an offer signed by the offeror will bind him though the contract is concluded by a subsequent parol acceptance:" Anson, p. 84.

Though neither written nor parol notice may be given, acceptance of the option may be implied from the acts and conduct of the parties—or may be waived: *Allan* v. *Riopel*[8]; *Friary Holroyd* v. *Singleton*.[9]

If the time for exercising the option is extended this constitutes in effect a new contract, and requires a new con-

[2] [1896] 2 Ch. 348.
[3] (Man.) 11 W. L. R. 118.
[4] (Man.) 20 W. L. R. 595.
[5] (Alta.) 12 W. L. R., at p. 656.
[6] [1904] 1 Ch. 305.
[7] Cf. *Pearson* v. *O'Brien*, 22 W. L. R. 705.
[8] (Alta.) 26 W. L. R. 248.
[9] [1899] 2 Ch. 261.

sideration to support it: *Archdekin* v. *McDonald*[10]; *Paterson* v. *Houghton*.[1] Where a certain number of days are limited for the exercise of the option, this means consecutive periods of 24 hours each running from the hour the option was given, and expiring at the corresponding hour of the last day, and not at midnight of that day: *Beer* v. *Lee*,[2] following *Cornfoot* v. *Royal Exchange Assurance Corporation*.[3]

In some instances the option is so drawn that payment of the purchase-money, or part of it or performance of other conditions within the limited time, are essential. All such precedent terms and conditions must be strictly complied with: *Brooke* v. *Garrod*[4]; *Lord Ranelagh* v. *Melton*[5]; *Weston* v. *Collins*[6]; *Paterson* v. *Houghton*[7]; Dart (7th ed.), 272.

Such a condition requiring payment of the purchase-money on a named day, must be complied with, even though no title has been shewn to the land. Dart (7th ed.), 273, citing *Brooks* v. *Garrod*.[8]

The decision of the Supreme Court of Canada in *Knight* v. *Cushing*,[9] would have been in line with this, if the receipt for the "deposit" in that case, had been merely an option; instead, unfortunately, it represented "the real and complete agreement between Kenwood on behalf of the defendants and the plaintiff."[10]

But where the time of payment is not obligatory, acceptance alone is sufficient to complete the contract, and pay-

[10] (Man.) 20 W. L. R. 595.
[1] 12 W. L. R. 334.
[2] 7 D. L. R. 436.
[3] [1903] 2 K. B. 383; [1904] 1 K. B. 40.
[4] 2 De G. & J. 2.
[5] 2 Dr. & Sm. 282.
[6] 11 Jur. N. S. 190.
[7] 12 W. L. R. 330.
[8] 2 DeG. & J. 67.
[9] 46 S. C. R. 555.
[10] *Per* Beck, J., in Alberta Court *en banc*. See comments on this case, *ante*, pp. 23 *et seq.*

ment may be made afterwards within a reasonable time. *Cf. Mills* v. *Haywood.*[1]

This principle is well illustrated in *Carey* v. *Roots,*[2] a very instructive case on several of the points under discussion. Harvey, C.J., (at p. 156). says: "As far as the payment of the money on the day named is concerned, the whole question appears to be whether the offer could be accepted or, as it is commonly expressed, the option could be taken up, without the payment of the money. If it could not the payment of the money was a condition precedent and the offer was binding only till the date fixed for the payment and could not be accepted after. If, however, the offer could be effectively accepted without the payment of the money, then upon such acceptance a new contract of purchase and sale would be complete and the rules applicable to such contracts would apply and in the absence of some stipulation or special circumstance time would not be essential." See *Weston* v. *Collins.*[3]

Part II.

Does an option to purchase create in the option holder an interest in the land? May it be obnoxious to the rule against perpetuities? How far does the benefit or burden pass to heirs, executors and administrators, or to assigns, on the one hand or the other?

These questions are all so intermixed that they cannot conveniently be dealt with separately: the cases are very conflicting—the whole subject is one of great difficulty.

See also the very interesting and careful article, controverting my main thesis, by Dr. Scott, in Vol. 38, Canadian Law Times, p. 242, which appeared while this chapter was going through the press.

The divergence of view is well illustrated by a comparison of the article in 39 Sol. J. 618 with the article by

[1] 6 Ch. D. 196.

[2] 5 A. L. R. 125.

[3] (1865) 34 L. J. Ch. 353, at pp. 354-5; 5 W R. 345; 11 Jur. (N.S.) 190.

Mr. Cyprian Williams in 42 Sol. J. 628, both discussing the question whether an option for purchase in a lease for years unrestricted in point of time, is bad as a perpetuity. The author of the article in vol. 39 after discussing *London & South Western Ry. Co.* v. *Gomm*,[4] and *Re Adams*,[5] reaches the conclusion that: "The option in such a case appears to run with the lease as an integral part thereof . . . and in consequence to be no more amenable to the rule against perpetuities than any other stipulations in a long lease relating to the land demised" and he thinks that *Re Adams* shews that covenants giving an option to purchase fall within the same exception to the rule against perpetuities as covenants to renew.

Mr. Williams, on the other hand, submits that to call an option of purchase an integral part of a lease goes much beyond what is warranted by the judgments in *Re Adams*. Later he proceeds:

"Now it has been held that an independent option of purchase, which does not mention the vendor's heirs or assigns, is personal to him, and not enforceable after his death (*Stocker* v. *Dean*[6]) and it seems to follow from this that if a contract giving such an option specified the vendor's heirs and assigns, but did not mention the purchaser's representatives, it would only be enforceable by the purchaser in his lifetime. Why should such a contract receive a different interpretation because contained in a deed granting a lease? It has nothing to do with the relation of landlord and tenant as such. Could it be enforceable at law, say, against the assigns of the reversion when not expressly bound, and taking, let us suppose, for value without notice of the lease or covenant? If not, it is not on a footing with those covenants which run with the land and

[4] 20 Ch. D. 562.

[5] 24 Ch. D. 200; 27 Ch. D. 394. Cf. argument for appellant in *Woodall* v. *Clifton*, [1905] 2 Ch. at p. 570.

[6] 16 Beav. 161.

the reversion. And in any case it is submitted that an option to purchase the reversion is not an integral part of the lease, &c., &c."

Then he calls attention to what indeed seems to be overlooked in many of the arguments and judgments, and pertinently asks—"But even if a lessor's covenant giving an option to purchase does run with the land at law, why should that except it from the operation of the rule against perpetuities?" and proceeds to elaborate.[7]

The subject is examined by Mr. Armour in his book on Devolution (pp. 48-51). The learned author had previously come to the conclusion, that even under an agreement of sale, until the purchaser has paid all his purchase-money, &c., he does not acquire an equitable estate in the land. He says—"If a purchaser's estate under a contract be not within the Act,[8] much less would an option to purchase which is only the right to accept an offer."

If "Cyc" may be accepted as an authority, the current of judicial opinion in the United States would appear to be in accord with Mr. Armour's conclusions. "Nor, by

[7] On this point Warrington, J., has this to say in *Woodall* v. *Clifton*, [1905] 2 Ch. at p. 264:—

"Now supposing it does run with the land, I confess I do not see why that fact takes it out of the mischief that it infringes the rule against perpetuities. I should have thought, on the contrary, it was just that fact which did create an interest in land, that if it was a mere personal and collateral covenant it might well be argued that it had no such effect; and it will be noticed that for the purposes of his judgment in *London and South Western Ry. Co.* v. *Gomm* the Master of the Rolls assumed for the purposes of his decision on that part of it that the covenant bound the defendant—that is to say, that it did either run with the land, or that the defendant was in such a position that, having notice of it, he was bound by it. The learned judge did that in the passage to which I have already alluded. He said the company must admit that it somehow binds the land. Therefore he dealt with the case in that part of his judgment on the footing that the covenant either ran with the land at law, or in some way bound the land in equity, which, for all practical purposes, comes to the same thing."

[8] The *Devolution of Estates Act* (Ontario).

the great weight of authority does a mere option to purchase land, before acceptance, vest in the holder of the option any interest, legal or equitable, in the land."[9]

St. Denis v. *Quevillon*,[10] shews that curiously enough very similar questions arise under the law of Quebec. In a lease of land for the term of five years, which was registered, the lessor agreed to sell the property to the lessee for a certain price at any time during the term of the lease. It was also stipulated that in the event of a proposed sale to any other person, for any price whatsoever, the lessor should notify the lessee thereof and give him the right, *by preference*, to exercise his option to purchase. After the expiration of about two years of the term, the lessor served written notice on the lessee requiring him to exercise his option forthwith and stating that, in default, he would sell to another person, without, however, mentioning the terms and conditions of the proposed sale and, on request by the lessee, these particulars were refused. The lessee took no action on this notice and the lessor executed a deed of sale of the property to P. by conveyance in which the latter undertook that the registered lease would be maintained in force. Two years later, the lessee brought suit against the lessor and P. for specific performance of the agreement to sell and, alternatively, for damages against the lessor for breach of contract.

Idington and Brodeur, JJ., held that the *pacte de préférence* was accessory to the lease and created a *real* right in the lessee, capable of being registered against the lands;

Duff and Anglin, JJ., held that the *pacte de préférence* was distinct from the contract of lease, and did not create *real* rights which could be protected by registration.

As there have been a number of recent decisions the whole subject seems open to review, especially in view of

[9] Vol. 39, p. 1237.
[10] 51 S. C. R. 603.

the judgments of Warrington, J., and of the Court of Appeal in *Woodall* v. *Clifton*[1] and of Warrington, J., in *Worthing Corporation* v. *Heather*.[2]

Nearly all the English cases on the subject deal with options contained in leases, and it may be found necessary to draw some distinctions where the option is an independent contract.

In respect to options contained in leases for years, three distinct views, each supported by considerable authority, have been advanced:

(1) A mere personal convenant;

(2) A covenant running with the land—whether within 32 Hen. VIII., c. 34, or not;

(3) Creating an executory interest in the land, and therefore void if *contra* to rule against perpetuities.

If the option is a mere personal covenant, no question of perpetuities would appear to arise;[3] no "interest" in the land is vested in the option-holder—no rights can pass to heirs, executors, administrators or assigns unless expresely named. If the option is contained in a lease then on this hypothesis it depends solely on *privity of contract*, and is quite independent of *privity of estate*. This view is very clearly stated in the argument by Rigby, Q.C., and in the judgment of Kay, J., in *London & South Western Ry* v. *Gomm*.[4]

If the second view be correct, i.e., that the option in the lease is in effect a covenant running with the land, the question at once arises whether it is within the statute 32

[1] [1905] 2 Ch. 257.

[2] [1906] 2 Ch. 532.

[3] But see article by Mr. Cyprian Williams in 51 Sol. J. 648, urging that any contract which tends unduly to restrict the power of alienation is contrary to public policy, and therefore void.

[4] 20 Ch. D. 562 (reversed in Ct. of App.)

Hen. VIII., c. 34. In *Woodall* v. *Clifton*[5] counsel for the appellants argued that the contract which created the option ran with the land; but that "the contract or covenant has nothing to do with the land, and is not within the rule against perpetuities, and that the statute of Hen. VIII. has no application." They argued—"It is admitted that the plaintiff would have no cause of action against the defendants but for the fact that the covenant runs with the land and thus creates privity of contract with the defendants; but the covenant does not bind the land nor create any interest in it."[6] Then they referred to the validity of a perpetual covenant to renew, as an analogy.

The Court of Appeal, in a most unsatisfactory judgment, held that the option "is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Hen. VIII. was dealing;" then, reverting back apparently to a previous clause in the judgment, "The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being," they dismiss the appeal. Does this mean that they accept the opinion of Warrington, J., who says "I think it is impossible to avoid the conclusion that it does create an estate or interest in the land; and if it does, then, for the reasons I have stated, it is one which is obnoxious to the rule"?

If this the third view be correct, i.e., that the option holder has an interest or estate in the land, then it seems clear it can only be an interest by way of *conditional limitation*, i.e., an estate to vest upon a future contingency, viz., the affirmative exercise of the option. Such conditional limitation is clearly void if it infringes against the rule against perpetuities.

[5] [1905] 2 Ch. 257, at p. 266.

[6] It must be confessed that the full argument of counsel, *as reported*, seems bristling with inconsistencies.

The rule against perpetuities, viz., that an executory interest must be so limited that from the first moment of the instrument creating it taking effect, it may be said that it will necessarily vest within the period occupied by the life or lives of a person or persons in being and a term of twenty-one years afterwards, or within the period of an absolute term of twenty-one years, without reference to any life—is summarized by Jessel, M.R. (*Re Ridley, 11 Ch. D. at p. 647*), who says: "The rule against perpetuities is that you shall not make property absolutely inalienable beyond a certain period. It is only a rule in favour of alienation." "The rule against perpetuities is a branch not of the law of contract, but of property" (per Kay, J., *London & South Western Railway Co.* v. *Gomm*[7]). It is an artificial rule, and a creation of the Courts, who considered that the tendency to create perpetuities against alienation was inconsistent with the welfare of the State, and therefore contrary to the policy of the law.[8]

In re Oliver's Settlement,[9] Farwell, J., says:—

"The rule against perpetuities is a comparatively modern development of the ancient rule of English law that one of the inseparable incidents of property is the right of alienation by appropriate assurances. The rule is one of public policy, and it has always been considered to be the duty of all the Courts to uphold it, not to assist in evading it."

One of the arguments advanced in favour of treating an option to purchase the fee in a lease as a covenant running with the land, was based on the recognized rule of law that a covenant to renew the lease runs with the land; and is not within the rule against perpetuities. This, however, is spoken of by nearly all the judges, who con-

[7] 20 Ch. D. 575.

[8] Smith on Real and Personal Property, par. 882. Cf. 51 Sol. Jl. 648 (per Cyprian Williams).

[9] [1905] 1 Ch. 196.

sidered this question, as an anomaly. The doctrine traces back to the reign of Elizabeth, being founded on the judgment of Dyer, C.J., and his associates in *Isteed* v. *Stonely*.[10] The executors of Richard Isteed brought an action on the covenant against Richard Stonely, the assignee of Jeffrey Morley "assignee le Roign soer & heir le Roign Mary soer & heir le Roi Edward fils & heir le Roi Henry assignee le Prior & Convent de St. Pancrace de Lewis." The Prior and Convent had leased certain lands to Richard Isteed for a term of 50 years, and by the same indenture—"concesserunt pro se & succes. suis quor legitimum esset dicto Richardo Isteed & suis assignat. ad aliquod tempus . . . habere dictum dimissionem renovatum pro tot pluribus annis, &c., &c." and it was claimed that by the operation of the Statute of Henry VIII. the defendant being seized of the reversion, and the plaintiff possessed of the lease, the plaintiff was entitled to a renewal. The arguments *pro* and *con* are strangely familiar, albeit expressed in a most barbarous mixture of Latin, French and English. For the defendant it was urged that the Statute did not apply—"car de covenants queux ne depend sur le interest del terre mes sont collateral choses," and that the assignee of the reversion was only bound by covenants "que tiels queux depend sur la terre comme a repairer, messauge fenses, &c., payment del Rent, penalties par non payment & semblables," and that since the covenant was to create a new term, it was the same as if the lessor had covenanted to grant a lease of other lands. This demurrer of the defendants was overruled by "Dyer Chief Justice . . . & les auters juges fuerunt de mesne le opinion."

Of the rule established by this case, Jessel, M.R., says "This is an exception to the general rule"[1]; in *Woodall* v. *Clifton*.[2] Warrington, J., says: "I think I must treat these

[10] A.D. 1580, 1 And. 82, 123 E. R. 365.

[1] *L. & S. W. Ry. Co.* v. *Gomm*, 20 Ch. D. 579.

[2] [1905] 2 Ch. 265.

covenants to renew as exceptions to the general rule—exceptions for which it is very difficult to find a logical justification, but exceptions which have been probably recognized because they were in existence long before the rule had been developed." And Romer, L.J., in the same case says: "I have always understood that the exception of covenants to renew a lease from the rule against perpetuities could not be justified on principle, but only by a long series of decisions," and again—"The fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly which it is too late now to question, though it is difficult to justify."

In *Birmingham Canal Co.* v. *Cartwright*[3] the questions arose as to whether a preferential right to purchase underlying mines contained in a conveyance of land (in which the mines were reserved to the vendor) and the vendor's covenant to convey, passed so as to bind the assigns of the vendor, and to give assigns of the purchaser the benefit; and also whether the covenant was a violation of the rule against perpetuities.

On the authority of *Gilbertson* v. *Richards*[4] it was held (Fry, J.), that the covenant was not obnoxious to the rule against perpetuities, and that the performance of the covenant could be enforced by assigns of the purchaser against devisees of the vendor.

In *London & South Western Railway Co.* v. *Gomm*[5] the question arose in regard to an option, contained, not in a lease, but in the form of a right to re-purchase in a deed of land.

The Railway Company in 1865 conveyed land to G. P. in fee for £100, and G. P. covenanted that he, his heirs or assigns, would at any time upon request of the company

[3] 11 Ch. D. 421.
[4] 5 H. & N. 458.
[5] 20 Ch. D. 562.

and payment of £100, re-convey. The defendant purchased the land from G. P.'s heirs, with notice of the covenant. The company duly requested re-conveyance, and on the defendant's refusal brought this action for specific performance of the covenant.

The action was heard before Mr. Justice Kay.

Rigby, Q.C., put his argument thus: "The defendant purchased the land with knowledge of the restriction—that he must resell it to the antecedent owner. This contract does not bind the land, but it binds anyone who purchases with the knowledge of the restriction. It has nothing to do with perpetuities."

Kay, J., referring to *Gilbertson* v. *Richards*,[6] and *Birmingham Canal Co.* v. *Cartwright*,[7] says:—

"I need not say after quoting such authorities I should distrust my own judgment where it differs from them if I did not find ample authority to support me. But I am unable to agree with these dicta. In my opinion a present right to an interest in property which may arise at a period beyond the legal limit is void notwithstanding that the person entitled to it may release it."

Then he proceeds:—

"But if I am right in this view thus far, it does not by any means follow that the contract in this case is void. The rule against perpetuities is a branch not of the law of contract but of property. . . . A contract not creating any estate or interest properly so called in property, at Law or Equity, is not, in my opinion, obnoxious to the rule. For instance a covenant to pay £1,000 when demanded, with interest meanwhile if not barred by the Statute of Limitations, might be enforced by an action of covenant at any time. A contract to buy or sell land and covenants restrict-

[6] 5 H. & N. 453.
[7] 11 Ch. D. 421.

in, the use of land, though unlimited, are not void for perpetuity. In these latter cases the contracts do not run with the land and are not binding upon an assign unless he takes with notice. They are not, properly speaking, estates or interests in land, and are therefore not within the rule. I think that this is the true test to apply to this case, and am of opinion that this covenant does not create any interest in land. A purchaser without notice . . . would not be bound by it. It is not, I think, within the rule against perpetuities at all. Consequently I hold that objection to fail; and as the defendant took the land with notice, I hold that he is bound in Equity by the covenant, on the principle of *Tulk* v. *Moxhay*."

The judgment was reversed in the Court of Appeal. Jessel, M.R., says:—

"Whether the rule (*i.e.* against perpetuities) applies or not, depends upon this as it appears to me, does or does not the covenant give an interest in land? If it is a mere personal contract it is of course not obnoxious to the rule . . . If it is a mere personal contract it cannot be enforced against the assignee.[a] Therefore the company must admit that somehow it binds the land. But if it binds the land it creates an equitable interest in the land. The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase, there is no doubt about this, and an option for re-purchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

[a] N.B.—G.P. covenanted that "he, his *heirs* and *assigns*" would reconvey.

Then he asks himself the question: "Now is there any substantial difference between a contract for purchase, or an option for purchase, and a conditional limitation?"—and he finds there is not.

To Sir James Hannen it appears "a startling proposition that the power to require a conveyance of land in the future does not create any interest in that land." He adds: "Now this covenant plainly would restrain the future owner from alienating the estate to anybody he pleases, it restricts him to alienating it to the railway company *in the event of the company exercising their option.*"

Lindley, L.J., agreed that "the covenant creates an interest in land and is void for remoteness."

In *Re Adams & Kensington Vestry*,[a] Pearson, J., refused to assent to the argument of counsel that "the covenant giving the option to purchase created an equitable interest in real estate which was vested in Ralph Adams as a separate interest from the leasehold interest," and that therefore it descended to his eldest son. He says "I think the option to purchase was an integral part of the lease, and must run with the lease."

The question in that case did not directly arise as to the right to exercise the option after the death of the option holder, but was in effect a contest between the heir and the next-of-kin, *after* the option had been exercised, and the land conveyed, as to whether it passed as real estate to the heir or as personalty to the next-of-kin.

In the Court of Appeal (27 Ch. D. 394) the argument for the appellant was put directly on the ground that the option created an immediate equitable estate.

Pownall (arguendo): "The covenant to convey the inheritance was quite unconnected with the lease. It was a

[a] 24 Ch. D. 206.

real covenant which descended to the heirs. It was an immediate equitable interest in Ralph Adams and his heirs, and was in the nature of real estate. The executors of the lessee could not sell the option with the lease."

The Court however upheld the judgment of Pearson, J.

Bagallay, L.J., says—"that the right of option, as one of the provisions contained in the lease, passed with the leasehold estate to the administrator . . . and he alone was capable of exercising that option. This appears to me to decide the question. I decide entirely upon the terms of that particular covenant."

Cotton, L.J., says:—

"The contract was one entered into with the lessee, his executors, administrators and assigns, and before I go further I agree that this covenant would be one the benefit of which would pass with the assignment of the lease, because it is a covenant with the lessee, that if he, his executors, administrators or assigns, shall give a certain notice, that the lessor would convey. *The "assigns" there must mean the assigns of the lease, &c.*"

Lindley, L. J., says:—

"We must deal with the question in this case with reference to the peculiar language of the covenant which is before us. Everything turns upon the language of the covenant, and I do not see how our decision in this case would be of the slightest use to anybody else any more than the decisions in the previous cases are of the slightest use to us in construing this covenant. The covenant is made by Smith, the lessor, with Adams, his executors, administrators, and assigns, and so on. Now I apprehend "assigns" there must mean the assigns of the lease; the context, I think, shews that."

In *MacKenzie* v. *Childers*,[10] Kay, J., says of *London & South Western Ry.* v. *Gomm*,—

"In that case the Court of Appeal overruled two cases which had decided that a limitation of property was not obnoxious to the rule if the person to take under that limitation could release it. But it also decided that mere contracts, whether by deed or not, are not within the rule, which only applies to limitations of property. The judges expressed an opinion that a contract by A to sell land to B or his heirs, at a fixed price, upon notice in writing given by B or his heirs, created an interest in land, and that there was no real distinction in equity between such a contract and a limitation by which upon such payment the estate would vest in B and his heirs. *No doubt that doctrine is entirely novel.*"

In *Friary Holroyd and Healeys Breweries Ltd.* v. *Singelton*,[1] Stone demised to Master, and covenanted with Master, that if he, his executors, administrators and assigns should at any time during the term be desirous of purchasing the freehold at a fixed price and should give six months' notice to Stone his heirs and assigns, Stone, his heirs and assigns would convey, &c. It was held (Romer, J.), that "assigns" had the same meaning as the word "assigns" added to the lease named in the covenants entered into by and with him in the lease, i.e., it meant the persons entitled to the term, and bound by and entitled to the benefits of the covenants entered into by the lessee and lessor respectively *which ran with the land demised.*

In *Manchester Ship Canal Coy.* v. *Manchester Racecourse Coy.*,[2] an agreement between the defendant and plaintiff contained a clause that if at any time it were

[10] (1889) 43 Ch. D. 265.
[1] [1899] 1 Ch. 86.
[2] [1900] 2 Ch. 352; [1901] 2 Ch. 37 (C.A.)

proposed to use the racecourse for dock purposes, the defendants would give the plaintiffs the "first refusal."

It was held that "first refusal" was equivalent to "right of pre-emption;" that the clause did not create an interest in land, but that on the principle of *Lumley* v. *Wagner* the plaintiffs could enforce their rights against the defendant and an intending purchaser proposing to use the land for dock purposes (by injunction), since the "first refusal" imported a negative contract not to part with the land to anyone else without giving plaintiff "first refusal." The trial judge granted an injunction restraining the Racecourse Coy. from selling the land to any person or company without having first offered it to the plaintiffs at the same cash price that the intending purchaser is offering.

Farwell, J., the trial judge, had held that the covenant created an interest in land following *London & South Western Ry.* v. *Gomm*, i.e., that the words may be construed "so as to limit a use to arise on an event in the future." The Court of Appeal differed from this view. Vaughan Williams, L.J. (judgment of Court), "We do not think that clause 3 does create an interest in land"; but they support the injunction granted by Farwell, J., on the principle of *Lumley* v. *Wagner*.

In *Woodall* v. *Clifton*[s] the whole subject is exhaustively reviewed.

A lease of land for ninety-nine years granted in 1867 contained a proviso that in case the lessee, his heirs or assigns, should at any time during the term be desirous of purchasing the fee simple of the land at the rate of £500 per acre, the lessor, his heirs or assigns, on receipt of the purchase-money, would execute a conveyance of the land in favour of the lessee, his heirs and assigns. In 1904 an

[s] [1905] 2 Ch. 257.

action was brought by an assignee of the lease, who had given notice of his desire to exercise the option, against assigns of the lessor to compel a conveyance of the land accordingly.

Warrington, J., dealing with the rule against perpetuities says:—

"If the grant creates an interest in land, then it seems to me that the effect of it is to render it something more than a mere covenant, and to create an interest in land which does not vest at the moment at which it is granted, *but requires for its vesting the happening of another event*, namely, the exercise of the option and the payment of the purchase-money, which event may happen beyond the limit. For the moment I do not propose to deal with any question whether that provision runs with the land or not. I take that provision by itself, and, looking at it by itself in the light of authority, I think it is impossible to avoid the conclusion that it does create an estate or interest in land; and if it does, then, for the reasons I have stated, it is one which is obnoxious to the rule. The authority to which I have alluded is that of the *London and South Western Ry. Co.* v. *Gomm*."

Explaining *London and South Western Ry. Co.* v. *Gomm*, he says:—

"All the learned judges in the Court of Appeal came to the conclusion that the defendant was not a person bound by the contract in question, not in law because the covenant was not one which could run with the land, and not in equity because it was not a negative covenant; and therefore not one falling within the principle of *Tulk* v. *Moxhay*. That, I cannot help thinking, might have been an end of the case; but the learned judges, and especially the Master of the Rolls, thought it right to deal with the other question, namely, the question whether, assuming that this was a covenant binding the defendant, it did or did not create an interest in land, and was, therefore, obnoxious to

the rule against perpetuities. They all of them deal with that point, the Master of the Rolls, Sir James Hannen, and Lindley, L.J., and the conclusion they all came to on that point was that the covenant did create an interest in land."

He concludes:—

"It appears to me that it is the very fact that the covenant runs with the land which makes it an interest in land, and an interest which is not vested in the lessee at the moment of the lease, but one which comes into existence only on the happening of a future event, namely, the exercise of the option and the payment of the purchase money. I think I must therefore make a declaration that the two options to purchase, following the words of the declaration asked in the writ, are not valid and subsisting options. I need not say anything about their exercise in that case. Then with that declaration, if the plaintiff desires it, the action will have to go to trial on the question whether the defendants are liable in damages or not."

In the Court of Appeal, the appellant's argument was:—

"There are two contracts, the one contained in the covenant, the other that which arises when notice to exercise the option is given. The first contract which creates the option runs with the land; but it has nothing to do with the land. It is not a limitation. The statute 32 Hen. VIII., c. 34, extends only to covenants which touch or concern the thing demised, and not to collateral covenants. The rule against perpetuities does not apply to contracts. Till the option is exercised, no interest in land is created, and the question of perpetuities does not arise. The person who contracts to give the option can still alienate the land though if he does so, he will be liable in damages for breach of contract. It is admitted that the plaintiff would have no cause of action against the defendant but for the fact that the covenant runs with the land and thus creates privity of contract with the defendants; but the covenant does not bind the land or create any interest in it."

Stirling, L.J., says:—

"Your contention is that by the exercise of the option an equitable interest in the land is created in favour of the lessee. That is so. There is no interest in the land until the option is actually exercised: until then the reversioner may sell the land. There can be no notion of perpetuity until the exercise of the option and the consequent creation of a new contract. Then there arises an equitable interest under a contract which must be specifically performed within a reasonable time. When the option is exercised, if the land remains in the occupation of the person who exercises the option, there is a good contract which can be specifically enforced; but if at the time when the option is exercised the reversioner has parted with the land, then the person who has the option can only obtain damages, not specific performance, because the land is gone. So that if the plaintiff has not a right to specific performance, he has at least a right to damages. The covenant giving an option to purchase is really an irrevocable offer, which is converted into a contract by the exercise of the option."

The judgment of the Court of Appeal was given by Romer, J., and is so important and so unsatisfactory, that it may well be reprinted here in full:—

"A contract in a lease giving an option of purchase might be good, without regard to the provisions of the statute of Henry VIII., as binding the land in the hands of the heirs or assigns, provided it did not infringe the law as to perpetuities. It would not be the less a binding contract because it was contained in a lease. But in the present case it is clear that the plaintiff cannot succeed on such a ground. Unless the covenant or proviso giving the option of purchase can be said to run with the land by virtue of the provisions of the statute, then the plaintiff must fail. Now undoubtedly the statute is in its wording very wide, but it has long been held that some limitations must be implied; as, for example, that the statute does not apply to covenants which

do not touch or affect the land demised, or to assigns where the covenants relate to things not in esse, and "assigns" are not expressed to be bound. The question in the present case is whether the statute was intended to cover, or can be construed as covering, such a covenant or proviso as we have now to consider, so as to make the liability to perform it run with the reversion. We have come to the conclusion that that question must be answered in the negative. The covenant is aimed at creating, at a future time, the position of vendor and purchaser of the reversion between the owner and the tenant for the time being. It is in reality not a covenant concerning the tenancy or its terms. Properly regarded, it cannot in our opinion, be said to directly affect or concern the land, regarded as the subject-matter of the lease, any more than a covenant with the tenant for the sale of the reversion to a stranger to the lease could be said to do so. It is not a provision for the continuance of the term, like a covenant to renew, which has been held to run with the reversion, though the fact that a covenant to renew should be held to run with the land has by many been considered as an anomaly, which it is too late now to question, though it is difficult to justify. An option to purchase is not a provision for the shortening of the term of the lease, like a notice to determine or a power of re-entry, though the result of the option, if exercised, would or might be to destroy the tenancy. It is, to our minds, concerned with something wholly outside the relation of landlord and tenant with which the statute of Henry VIII. was dealing. And allowing such a provision to come within the purview of the statute, and to be enforced as running with the land, would lead to very anomalous and, to our minds, most undesirable results as to perpetuities, conversion, and otherwise, which this Court should not validate unless it is obliged to do so. And we cannot think that the Court is so obliged on the true construction and effect of the statute. It is strange that there is no direct authority on the point. There are cases where the option has been exercised by the tenant and

accepted by the landlord, and subsidiary questions have had to be decided which naturally would be dealt with on the footing that what had already been done could not or need not be questioned by the Court; as, for example, *In re Adams and Kensington Vestry*. But such cases are really of no assistance for the decision of the present case. In our judgment the appeal should be dismissed."

Worthing Corporation v. *Heather*.[4] The effect of this judgment is that apart from the rule against perpetuities, the Court could not grant specific performance of covenant—but the rule is directed not against the contract, but against the limitation. The contract is not illegal, therefore though the Court cannot decree specific performance, it can grant damages for breach of contract.

In the London & South Eastern Railway v. *Associated Portland Cement Manufacturers*,[5] *the Gomm case*[6] is commented upon, though the question considered in the Cement Manufacturers' case arose out of an agreement by the Railway Company, who had purchased a strip of land for their line, that the land-owner, his heirs or assigns, might, at any time thereafter, make a tunnel thereunder to join the lands severed thereby. The case is chiefly interesting for our purposes on account of the comments of Swinfen-Eady, J., and Cozens-Hardy, M.R., on the *Gomm case*.

From this conflict of cases, certain propositions seem to be fairly established:

First: that an option to purchase the land contained in a lease, will not receive any different interpretation from such an option the subject merely of an independent contract;[7]

Second: that neither the benefit nor the burden of the covenant contained in a lease runs with the land, and it is

[4] [1906] 2 Ch. 532.
[5] [1910] A. C. 12.
[6] 20 Ch. D. 562.
[7] 39 Sol. J. 618; *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *London & South Western Ry.* v. *Gomm*, 20 Ch. D. 562 (*per* Kay, J.)

not within the statute (32 Henry VIII., c. 34): *Woodall* v. *Clifton*;[8]

Third: that neither the benefit nor the burden of the option passes to personal or real representatives or assigns unless expressly named;[9]

Fourth: that the option contract may be void for remoteness if it offends against the rule against perpetuities. Although most of the cases point out that it is only in view of the option contract creating an interest in the land, that the rule against perpetuities can apply to it, still, it is very forcibly argued by Mr. Cyprian Williams in his article in 54 Sol. J., that *any* contract which has the effect of an unreasonable restraint on alienation of land, will be void.

This leaves us still with the main question, namely, whether such an option does or does not create in the option holder an estate or interest in the land?

The doctrine that an option to purchase does create in the option holder an interest in land, depends for its authority almost entirely on the case of the *L. & S. W. Ry. Co.* v. *Gomm*.[10] In *MacKenzie* v. *Childers*,[1] Kay, J., says of the doctrine established by this case, "no doubt that doctrine is entirely novel," and his interpretation of the case is that "the judges expressed an opinion that a contract by A to sell land to B or his heirs at a fixed price upon notice in writing would create an interest in land, and that there was no real distinction in equity between such a contract and a limitation by which upon such payment the estate would vest in B and his heirs."

[8] [1905] 2 Ch. 257.

[9] Cyprian Williams in 42 Sol. J. 628; Armour on Devolution, p. 51; *Re Adams*, 27 Ch. D. 394; *Woodall* v. *Clifton*, [1905] 2 Ch. 257; *Stocker* v. *Dean*, 16 Beav. 161; *Meynell* v. *Surtees*, 3 Sm. & G. 117, 25 L. J. Ch. 257; *Vanderlip* v. *Peterson*, 16 Man. 241.

[10] 20 Ch. D. 562.

[1] 43 Ch. D. 265.

In *Woodall* v. *Clifton*,[3] the trial judge, Warrington, J., expressly puts his decision upon the authority of the *Gomm case*. He says: "I think it is impossible to avoid the conclusion that it does create an estate or interest in land; and if it does, then, for the reasons I have stated, it is one which is obnoxious to the rule. The authority to which I have alluded is that of the *London & South Western Railway* v. *Gomm*." But he expressly points out that the case might have been decided simply on the principle that the defendant was not the person bound by the contract in question, because in law the covenant did not run with the land, and because in equity, it was not a negative covenant,[3] and that the learned judges and especially the Master of the Rolls, *thought it right* to deal with the other question (i.e., whether the covenant did or did not create an interest in land, &c.) On the appeal from Warrington, J., the judgment of the Court was delivered by Romer, J. (printed in full [illegible] at 258), and while the appeal was dismissed, it is submitted it is quite impossible to discover from the judgment, upon what principle the Court acted; that is, the judgment of the Court of Appeal, it is submitted, is certainly not an affirmation of the doctrine that an option to purchase creates an interest in land. In fact, during the course of the argument in that case, Stirling, J., says to counsel: "Your contention is that by the exercise of the option an equitable interest in the land is created in favour of the lessee. That is so. There is no interest in the land until the option is actually exercised; until then the reversioner may sell the land."

In *Carey* v. *Roots*,[4] Simmons, J. (at p. 141), seems to approve of the principle of the *Gomm case*.

[3] [1905] 2 Ch. 257.

[3] It will be observed that this is directly contrary to *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* [1901], 2 Ch. 37, where it was held that an injunction would lie because such a covenant was in effect a negative covenant, *i.e.*, a covenant not to convey to anyone else.

[4] 5 A. L. R. 125.

Williams on Vendor & Purchaser, at p. 555 (Note R), states: "A contract giving an option to purchase any land, gives an *interest* in the land to the person who holds the option, and must therefore conform with the 4th section of the Statute of Frauds."

The only authority quoted is the Gomm case; but the learned author himself in his scholarly article in 54 Sol. J. 472, states that the real ground of the decision in *Gomm's case* was this: "Where a limitation of a future estate or interest (legal or equitable) in land would be void for remoteness if actually made by way of immediate assurance, a contract to make such a limitation shall not confer any valid right to or against the land."

Now the above seems to be a fair statement of the authority upon which rests the doctrine that an option to purchase creates an estate in land, and after all said and done, it depends almost entirely upon the judgment of the Court of Appeal in *London & South Western Railway* v. *Gomm*.

Before discussing the question on general principles, it must be admitted that the decision in the *Gomm case* has been almost completely shattered by subsequent explanations and criticisms, and indeed, in a subsequent case in the Court of Appeal, if not absolutely dissented from, it is ignored.[5]

To begin with, it is clear from the judgment of Mr. Justice Kay (a very eminent judge) in *MacKenzie* v. *Childers*,[6] that in spite of the decision of the Court of Appeal, he remains of the same opinion that he expressed as the trial judge in the *Gomm case*, in which he expressed the opinion "that this covenant does not create any interest in the land: a purchaser without notice . . . would not be bound by it." Warrington, J., in *Woodall* v. *Clifton*,[7] it is true, follows this

[5] *Manchester Ship Canal Coy.* v. *Manchester Racecourse Coy.*, [1901] 2 Ch. 37.

[6] 43 Ch. D. 265.

[7] [1905] 2 Ch. D. 257.

case, but he points out, as already noticed, that the judges in the Court of Appeal went out of their way to express the opinion that the covenant did create an interest in the land.

This seems in line with the articles by Mr. Cyprian Williams in 51 Sol. J. 648, 669, and in 54 Sol. J. 471, 501, where he submits that any agreements that are in general or unlimited restraint of alienation ought to be treated as void under the rule against perpetuities as a matter of public policy, whether they deal with land or not. Thus he states in his criticism of *Worthing Corporation* v. *Heather*,[8] in 51 Sol. J. 648, after pointing out that appeal in this case was entered but subsequently compromised:—

"It must be admitted that a contract giving an option of purchase does not, at Common Law, create an actual limitation of the land . . . but it is submitted that the contract should have been held to be void at law, not because it broke the rule against perpetuities, but because it infringed the policy of the law with respect to the imposition of restraints on the exercise of the right of alienation incident to ownership."

In the *Manchester Ship Canal Coy.* v. *Manchester Race Course Coy.*,[9] Farwell, J., the trial judge, following the *Gomm case*, had held that the covenant created an interest in land, i.e., "so as to limit a use to arise even in the future."

The Court of Appeal entirely differed from this view of the case.

The judgment of the Court was delivered by Vaughan Williams, L.J., who distinctly says: "We do not think that clause 5 does create an interest in land."

Now in this case it will be observed that not only was the *Gomm case* referred to by the trial judge, but it was also referred to in the arguments of counsel, so that it would

[8] [1906] 2 Ch. 532.
[9] [1900] 2 Ch. 352; [1901] 2 Ch. 37 (C.A.)

appear that the judgment of the Court of Appeal in the *Gomm case* is, in effect, overruled by the subsequent judgment in the *Manchester Racecourse case*.

If this is so, then the question is clearly at large.

The reasoning of Sir George Jessel, M.R., in the *Gomm case*, is very effectively criticised by Mr. Armour in his book on Devolution, at pp. 48, 49 and 50. Sir George Jessel said: "The right to call for a conveyance of the land is an equitable interest or equitable estate. In the ordinary case of a contract for purchase, there is no doubt about this, and an option for re-purchase is not different in its nature." Mr. Armour points out the fallacy in this statement. Mr. Armour had previously contended that even in the case of contract for purchase, there was no equitable interest or estate in the purchaser (at least until all his purchase money was paid), but however this may be, he points out that the position of an option for purchase, or re-purchase, is a very different thing from an actual contract for purchase. Thus he states: "but it appears that an option is something entirely distinct from a contract. The latter imports a legal obligation to buy, and if there is no legal obligation to buy, where an option only is held, then there is not only no agreement, but no obligation upon the person holding the option, even to make an agreement, and if no agreement, no property, and no liability to answer in damages or otherwise; no refusal to buy."

On principle, it appears we must come back to an analysis of what an option is, already referred to in the first part of this article (Vol. 35 C. L. T. p. 799 *seq*).

The so-called option must be resolved into two distinct things;

In the first place, it is an offer to sell at a certain price and upon certain terms, open to acceptance or to refusal until revoked;

Secondly, it is a contract—a promise given in consideration of a certain sum of money—that the offer will not be revoked for a definite period.

Now, if such an option creates an interest in land, why, upon principle, should not an ordinary offer, so long as it is open (i.e., until revoked), likewise create an interest in land? The interest in land surely cannot be created merely by the contract to keep the offer open for a certain definite number of days, weeks or months. But no one would be absurd enough to contend that a mere offer, so long as it is unrevoked, but prior to acceptance, created in the offeree any interest in the land.

There appears in the *Gomm case*, and in many subsequent cases, a great confusion between the contract of option, and the subsequent contract involving a conveyance of the land that would only come into existence when the option had been accepted.

Thus, in the *Gomm case*, Sir George Jessel states, in effect, that there is not any substantial difference between an option for purchase and conditional limitation. That might be true if the effect of the mere acceptance of the option was to cause an immediate divestment of the estate of the vendor, and the immediate vesting of the estate in the purchaser. But this is not the effect of the acceptance of the option. The exercise of the option merely creates the relationship of vendor and purchaser between the grantor and grantee of the option. Thus the purchaser under such circumstances is actually entitled to the same proof of title as under a contract of sale.[10]

Now it is submitted that this is not at all what a conditional limitation means.

'A conditional limitation in the specific sense, is a proviso by way of use or devise, for the annihilation of an inter-

[10] Dart on Vendor and Purchaser (7th ed.), p. 274, citing *Welchman v. Spinks* (1861), 5 L. T. 385.

est under a preceding limitation in a particular event which is unconnected with the original quantity of that interest, and which may not happen till after such interest has become vested, and for the creation of a new interest in its stead in favour of another person.' [1]

'These limitations can only be by way of use or devise.' [2]

'That contingent event, when it happens, is the limitation of the first estate granted; and the estate (instead of going back to the original grantor) goes over *eo instanti*, and *without any act* but that of the law, to the party named in the very gift itself of the estate, as the one to take it in that event.' [3]

In Mr. Cyprian Williams' Article (54 Sol. J. 471), criticising the decision in the *South Western Railway* v. *Associated Portland Cement Manufacturers*,[4] he gives the following as an example of a conditional limitation:—

'If A in consideration of £100 paid to him by B grant Blackacre to B in fee simple to the use of A in fee simple with a proviso that on payment by B, his executors, administrators or assigns to A, his heirs and assigns, of the sum of £500 at the expiration of twenty-one years after the death of A . . . the land *shall go and be held to the use of the person making such payment in fee simple*, that proviso would be a void *limitation*' (i.e., because infringing the rules against perpetuities).

Then he proceeds to point out the true doctrine in the Gomm case, which he submits is this:—

'That a contract to make such a limitation cannot confer any equitable right to or against the land, in whosoever's hand the land may be.'

[1] Smith's Real and Personal Property, p. 169.
[2] Op. cit. 170.
[3] Washburn on Real Property, par. 1640.
[4] [1910] 1 Ch. 12.

It is respectfully urged that the fallacy in Sir George Jessel's statement that there is no substantial difference between an option for purchase and a conditional limitation, and the statement of Sir James Hannen that it is a startling proposition "that the power to require a conveyance of land in the future does not create any interest in the land," is simply this. The option is not a power to require a conveyance at all. If the exercising of the option were a contingency, upon which the estate of the vendor would immediately pass to the purchaser, it might be a conditional limitation; but as a matter of fact, all that happens when the option is exercised is that the relationship of vendor and purchaser is established between the parties. The vendor at that stage has not got a right to call for a conveyance, but has a right to call upon the purchaser for an abstract and evidence of his title. Then having accepted title, he can, if he chooses to pay the purchase-money, demand a conveyance.

Confusion is also occasioned by the careless use of the expression "specific performance." When the holder of the option accepts the offer and a contract of sale results, it is quite obvious that either party can ask specific performance of the contract. It is just the ordinary case of an agreement of sale of land. But how can there be a decree of specific performance of the *option contract*, which is merely a contract to hold the offer open for acceptance for a certain period? It may be that the Court may hold the option contract to import a negative covenant, and therefore that the Court might restrain the vendor from selling to anyone else than the option holder on the principle of *Lumley* v. *Wagner*. But even this is doubtful as before pointed out.

And so also with damages: In *Worthing Corporation and Heather*, Warrington, J., holds that though a contract may be unenforceable by way of specific performance on the ground of its remoteness, still damages may be recovered for the breach of it. Breach of what?

It is not for breach of any covenant to convey. It can only be damages for breach of the contract to keep the offer open. At the risk of almost tedious reiteration, let us illustrate the actual position thus. Suppose on June 1st A offers to sell Blackacre to B. for $1,000—On June 4th the offer remaining still open, B says to A, "I have not made up my mind whether to accept your offer or not, but I will give you $100 if you will keep the offer open till June 30th," and A accepts the $100 and agrees accordingly. Now no person could possibly contend that in the interval from June 1st to June 4th, B had any estate or interest in the land, or anything that could be the subject of specific performance, or the foundation for any claim for damages. The position then of those who contend that the holder of an option has an estate in the land, must be this. As soon as A and B entered into the entirely separate contract of June 4th, by which A agreed to keep the offer open, an estate or interest in the land immediately became vested in B. Surely a magical effect!

In conclusion, it is submitted that the better opinion is, that an option whether contained in a lease or not, is a purely personal contract between the option grantor and the option grantee; that it passes or creates no present interest in the land; that it does not pass to heirs, executors, administrators or assigns on either side, unless they are named in the contract, in which case they can take advantage of the contract, not by way of transmission or succession, but as persons actually named in the contract itself; that an option contract is not one which can be registered as an instrument[a] under the *Land Titles Act* (Alberta) or similar statutes.

[a] In *Carey* v. *Roots*, 5 A. L. R. 125, Simmons, J., notices that the registrars in Alberta are in the habit of permitting registration of such options.

CHAPTER X.

Supplementary.

Equitable Estate of Purchaser.

Ante, p. 1, et seq.

The nature and quality of the estate, interest, or "equity" of the purchaser under an agreement of sale is discussed in *Allen* v. *Commissioners*[1] in which the definition of "owner" in "The Finance Act 1910," sec. 41, was in question. In this case, the agreement of sale provided for payment of the purchase money in instalments, and the execution of conveyance on completion of payments. On execution of the agreement, the purchasers had been allowed into occupation. Though the payments were not complete (although not in arrear), the purchasers were held to be "*owners.*"

The Act defined "owner" (*inter alia*) as "the person entitled in possession to the rents and profits of the land *in virtue of any estate of freehold.*"

The Court of Appeal (Cozens-Hardy, M.R., Sir Samuel Evans, and Joyce, J.), affirming Scrutton, J. (1914, 1 K. B. 327), approves the dictum, in *Lysacht* v. *Edwards* (2 Ch. D. p. 505), of Jessel, M.R., "one of the greatest masters of equity"; and the judgment of the Court concludes: "On these particular contracts the purchaser, who is in possession (though his instalments are not yet paid, and he has therefore no conveyance of the legal estate), is beneficial owner in possession not in reversion, entitled in the Courts to the rents and profits of the land by an equitable estate in fee simple, or beneficial ownership, defeasible on non-payment; but convertible into a legal fee-simple on payment."

[1] (1914) 2 K. B. 327; and cf. *Re Calgary & Edmonton Land Co.*, 2 A. L. R. 446; 45 S. C. R. 170.

As to the Vendor being a Trustee.

Ante, p. 2.

In *Howard* v. *Miller*,[2] Lord Moulton, delivering the judgment of the Board, says:—

"It is sometimes said that under "a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold, subject to a lien for the purchase money: but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a Court of Equity would under all the circumstances of the case grant specific performance of the contract."

The vendor is however a trustee to this extent: so long as he remains in possession he is bound to take *reasonable* care to preserve the property in the same condition in which it was at the date of the contract of sale.[3]

The Vendor Must Show a Good Title.

Ante, p. 7.

In *Goodchild* v. *Bethel*[4] (Alta.), Beck, J., says: "The practice in this jurisdiction, where the Torrens system only is in force, of showing a title by production of an abstract, differs greatly, as it must, from the practice in England.

"I think that in an open contract of sale and purchase, there is an implied term to the effect that the vendor is bound when the time for showing title has come, to produce on request of the purchaser a registrar's abstract and general certificate, and in case the registrar's abstract does not show a sufficient title, also a written statement showing how the apparent defects are met."

[2] 1915 A. C. 318 (P.C.)

[3] *Lobel* v. *Williams*, 25 Man. R. 161.

[4] App. Div. 30 W. L. R. 280: cf. *Krom* v. *Kaiser*, 21 D. L. R. 700, esp. at p. 709.

Ante, p. 7, note 1.

Add cit. *Gibbs* v. *Gibson* (Alta.), 9 W. W. R. 190.

P. 8.

Erratum. For "A" (line 114) read "V."

Matters of Conveyance.

Ante, p. 27.

P. 27, *Note 6*, add cit. *Morsell* v. *Chapman*, 1915, 1 Ch. 162.

Ante, p. 28.

In *Goodchild* v. *Bethel* (Alta.), *supra*, it was held by the Appellate Division that: A vendor, under an open contract for the sale of land, who is not in fact the registered owner, shows a good title if he is entitled to compel a transfer to him, even though his title is subject to encumbrances which exceed the purchase price, provided the encumbrancee is compellable to take his money by the time a good title is to be proved.

When the time arrives for completion of the contract by transfer from the vendor and payment of the purchase money by the purchaser, the purchaser, in a proper case, will be ordered or permitted to pay his money into court for the purpose of discharging encumbrances against the land. If either party is not ready at the appointed time, a time may be fixed by a notice to the other party giving a reasonable time for completion and making time of the essence, on non-compliance with which the party giving the notice may call the contract off.[5]

If a good title is shown and proved and the vendor, though apparently entitled under an enforceable agreement to get in an outstanding interest, is resisted in the enforcement of it, the vendor is entitled to a reasonable time within which to procure the enforcement of the contract.

[5] Cf. *Stickney* v. *Keble* (1915), A. C. 386. *See post*, p. 282.

Payment into Court.

Ante, p. 28.

The vendor has not a co-relative right to require the purchaser to pay money into Court to discharge the claim of the registered owner to unpaid purchase money on an agreement of sale under which the vendor makes out his title. Such a claim by the registered owner is not an "encumbrance."

This was so held in *Greene* v. *Appleton*[1] (App. Div. Alta.), and the agreement of sale was held unenforceable by the vendor, since he had merely an equitable interest under his contract with the registered owner: (*Goodchild* v. *Bethel*, 19 D. L. R. 161; *Lee* v. *Scheer*, 19 D. L. R. 36; *Robinson* v. *Harris*, 21 O. R. 43, distinguished).

Action for Price.

Ante, p. 31.

A promissory note given for the "cash" payment (or *semble*, for any payment) cannot be collected by the vendor, or by a holder taking subject to the equities, if the agreement of sale is subsequently cancelled or rescinded.[2]

Rescission—Determination, &c.

Ante, p. 53 et seq.

Since the second edition of this book was issued, a very complete treatise dealing with the subjects discussed by me under the above headings, as well as with other cases (*e.g.* misrepresentation, mistake) of rescission, determination, avoidance, dissolution, etc., of contracts, generally, has been issued by Stevens and Sons (London, 1916), written by Mr. C. B. Morison, K.C., of the New Zealand Bar. It is a most valuable book, and I may be permitted strongly to urge its careful perusal and study on all of my readers.

[1] 25 D. L. R. 893; cf. *Krom* v. *Kaiser*, 25 D. L. R. 700, at p. 709.

[2] *Marchel* v. *Taplin* (Sask), 15 W. L. R. 149; *Wilson* v. *Abbott* (Sask.), 6 W. W. R. 1097.

Though the terminology differs, the line of thought and reasoning is very similar to my own. Mr. Morison begins by calling attention to the confusion arising from lack of clear definition of terms. "The difficulties which arise in any treatment of the topic 'rescission' are largely due to the use by writers and judges alike of a loose and vague terminology leading to a confusion of principles," reads like a sentence from my own book.*

He does not attempt to give a definition that will cover all cases of rescission. "The idea of framing a definition of the term at once concise and useful must therefore be abandoned in favour of a classification of the various kinds of cases to which the term is applied in practice." For the purposes of his treatise he treats of:—

(a) Contracts which are executory.

(b) Contracts which have been performed.

(c) Contracts partly performed, but under which obligations still remain outstanding to be performed by one or both parties.

In regard to *executed* contracts, he suggests that "rescission" of the *contract* is not an accurate term—the avoidance denotes rather the abrogation of the *status* of the parties, and the restoration of the *status ante quo*. "Rescission of the sale," or "rescission of the purchase," appears the more accurate expression.

"Rescission" applied to executory contracts denotes "the *determination* of unperformed contractual obligations."

The learned author then proceeds to a classification of cases of "rescission," "dissolution," "avoidance," "restitution"—"using these distinctive terms as indicating the determination of obligation, or abrogation of status, in the

* I am prepared to accept Mr. Morison's terminology and definitions for the sake of uniformity, and can only hope that they will be generally adopted.

particular classes of contracts to which they respectively apply with aptness"—thus:—

I. Contracts which are absolutely or contingently binding on both parties from their inception, or have so become by the election of a party having a right of avoidance, to affirm the contract, so that the obligations thereunder cannot be varied or terminated by the parties without the consensus expressed, implied, or constructive of both. (It will be seen that the rescission of a contract by one party by reason of the repudiation of obligation by the other, is treated as a termination of obligation by constructive consensus of both).

II. The term "rescission" is often applied to cases where one party is discharged from his obligation or promise,

(a) By the failure or non-fulfilment of a condition (whether precedent or concurrent) which renders the obligation on such promise contingent;

(b) By actual breach, or by failure or inability (whether voluntary or involuntary) of the other party to perform the whole consideration supporting such promise or obligation.

III. Contracts which are, from their inception, voidable until the party having the right to avoid elects to affirm or debars himself from avoiding. This class does not include contracts containing an express power of rescission exercisable in a given contingency (resolutive condition), but includes—

(a) Contracts induced by fraud, etc., and all contracts voidable *ab initio* for any reason at the instance of one party, and

(b) Contracts voidable at the election of either party as, for example, a contract based on mutual mistake.

IV. Contracts which are based on the mutual assumption of the continued or future existence of some state of things contemplated by both parties as essentially the basis of the

contract, so that on the failure, without default of either party, of such assumed state of things, such a contract is or may be treated at the instance of either party as rescinded (dissolved) by operation of the law.[10]

To class I. he appli the term "rescission."

In regard to class II., he suggests that the expression "rescission" is not strictly applicable—he appears to suggest the word "discharge," subdivided into:—

(a) Discharge by failure of consideration.

(b) Discharge by failure or non-fulfilment of condition.

For class III. he uses the term "avoidance"; and for class IV. "dissolution."

It will be observed that it is only classes I. and II. that are dealt with in this book. The term "discharge" which he uses for class II. is the equivalent pretty closely of my expression "determination"; his "rescission" is much the same as mine, and he agrees with me that all these cases of rescission can be reduced to mutual agreement between the parties. "It will be seen that the rescission of a contract by one party by reason of the repudiation of obligation by the other is treated as a termination of the obligation by constructive *consensus* of both."

In *Michael* v. *Hart*,[1] Collins, M.R., says: "There must be two parties to a rescission."

Lord Esher in *Johnstone* v. *Milling*[2] states: "Accordingly the defendant has recourse to the doctrine laid down in several cases cited, the best known of which is perhaps the case of *Hochster* v. *De la Tour*.[3] In those cases the doctrine has

[10] As for example in *Kreil* v. *Henry* (1903), 2 K. B. 749; cf. (*contra*) *Vancouver Breweries* v. *Dana*, 52 S. C. R. 134; *Charrier* v. *McCreight* (Alta.), (1917) 1 W. W. R. 834.

[1] 1902, 1 K. B., at 490.

[2] 16 Q. B. D., at 467.

[3] 2 E. & B. 678; 22 L. J. Q. B. 455.

been expressed in various terms more or less accurately; but I think that in all of them the effect of the language used with regard to the doctrine of anticipatory breach of contract is that a renunciation of a contract, or, in other words, a total refusal to perform it by one party before the time for performance arrives, does not by itself amount to a breach of contract, but may be *so acted upon and adopted by the other party as a rescission* of the contract so as to give an immediate right of action. When one party assumes to renounce the contract, that is, by anticipation refuses to perform it, he merely, so far as he is concerned, declares his intention then and there to rescind the contract. Such a renunciation does not of course amount to a rescission of the contract, because one party to a contract cannot by himself rescind it, but by wrongfully making such a repudiation of the contract he entitles the other party, if he please, *to agree* to the contract being put an end to, subject to the retention by him of his right to bring an action in respect of such wrongful rescission."

* * * * * * *

"He cannot, however, himself proceed with the contract on the footing that it still exists for other purposes, and also treat such renunciation as an immediate breach. If he adopts the renunciation, the contract is at an end except for the purposes of the action for such wrongful renunciation; if he does not wish to do so, he must wait for the arrival of the time when in the ordinary course a cause of action on the contract would arise. He must elect which course he will pursue."

Rescission—Repudiation, &c.

Ante, 165-166.

The distinction suggested by Parker, J., in *Halkett* v. *Dudley*,[2a] between "repudiation" as an equitable defence to specific performance, and the common law right of "rescission" is disapproved in *Innis* v. *Costello*.[2b]

[2a] [1907] 1 Ch. 590.

[2b] (1917) 1 W. W. R. 1135 (Alta. App. Div.).

A purchaser who discovers that his vendor has no title, and has no right to demand it from any third party, may if he act promptly repudiate the contract and recover purchase money paid.

"Want of title owing to a prior exception of coal entitles a purchaser to repudiate, at any rate, where the vendor's title shows a reservation of it; a right of repudiation under these circumstances is not a mere equitable right, but also a right at law entitling the vendor to say that he will not go on with the contract, to declare it at an end and to sue at law for the return of money paid thereunder." (Dictum in *Halkett* v. *Earl of Dudley* (1907), 1 Ch. 590, disapproved.[4]

This case was followed by the Alberta Appellate Division in *Universal Land Security Company* v. *Jackson*;[5] and in it Beck, J., collects the authorities, and considers generally the purchaser's right of repudiation for defects in title.

The headnote is as follows:—"Absence of title on the part of the vendor of land to the minerals under the land sold is sufficient to justify repudiation on the part of the purchaser." (*Innis* v. *Costello*, 35 W. L. R. (11 W. W. R.) 1155, applied. *Per curiam*).

The purchaser under an agreement of sale of lands can repudiate the contract for want of title in the vendor at any time before the vendor has acquired or placed himself in such a position that he can enforce a right to acquire a title according to the exigency of the agreement. This rule is perhaps subject to an exception in case there is a want of title only to so comparatively a small portion of the subject-matter of the sale that the Court would hold it to be a case for compensation. If the objection to the title relates only to some defect in the title, as distinguished from an absolute want of title, or relates to a want of title to only such

[4] *Innis* v. *Costello* (*supra*). See *Johnstone* v. *Milling*, *supra*, p. 276.

[5] (1917) 1 W. W. R. 1352.

a comparatively small portion of the subject-matter of the sale as above mentioned, then the vendor has until the time at which he is bound to show title to perfect the title in the one case, or to acquire title to the small portion in the other, before the purchaser can repudiate; and where the case is one for compensation, and compensation is offered, presumably he could not repudiate. Under our common form of agreement for sale and purchase of land for a price payable by instalments, where a transfer is to be given on payment of the purchase money in full, the purchaser is entitled to demand of the vendor, before he pays any deferred instalment, that the vendor show that he has a good title or can compel a conveyance to himself so as to have a good title at the maturity of the last instalment. If, therefore, the purchaser makes such a demand, he is entitled to have the demand complied with within a reasonable time, or within a time fixed by notice, if the time be reasonable, and in default to repudiate the agreement. A repudiation may be made by the purchaser bringing an action for rescission or by his making it in his defence to the vendor's action. Where there is no repudiation, the Court will give a reasonable time to the vendor, and this is usually done by way of a reference. (*Nimmons* v. *Stewart*, 1 Alta. L. R. 384; *Graves* v. *Mason*, 2 Alta. L. R. 179, 1 Alta. L. R. 250; *Reeve* v. *Mullen*, 5 W. W. R. 125; *Rutherford* v. *Walker*, 1 Alta L. R. 122; 1 Alta. L. R. 250; *Goodchild* v. *Bethel*, 7 W. W. R. 832; *Ewing* v. *McGill*, 7 W. W. R. 1147; *Lee* v. *Sheer*, 7 W. W. R. 927; *Krom* v. *Kaiser*, 8 W. W. R. 239; *Armstrong* v. *Marshall*, 8 W. W. R. 300; *Ballantyne* v. *Hettinger*, 8 W. W. R. 440; *Newberry* v. *Langan*, 3 W. W. R. 426).

In *Green* v. *Clark*[a] (May, 1916), the Appellate Division (Alberta), had already held that where the purchaser has attempted to repudiate on account of a small shortage of the land described, of which the vendor was not aware when entering into the agreement, but which shortage the vendor

[a] 9 A. L. R. 535.

had made up by acquiring the strip of land required for the purpose before the last instalment of the purchase money fell due, the vendor was entitled to specific performance.

The subject was further considered by the same Court in *Pugh* v. *Knott*.[1] The judgment of the Court was delivered by Beck, J. The purchaser attempted to repudiate because the land was subject to certain irrigation rights in favour of an irrigation company. Beck, J., points out that in the case under consideration these burdens would affect the land to a very inconsiderable degree; that by the agreement the purchaser had "expressly accepted the terms of its (the vendor's) agreement with the . . . company" (he says there seems to be some ground for this contention but that it is not necessary to decide it), "because the plaintiff obtained the removal of the caveat (*i.e.* in favour of the company) altogether, and the plaintiff having acted in good faith throughout, the principle applied by this Court in its recent decision in *Green* v. *Clark* (9 A. L. R. 535), is I think undoubtedly applicable here."

"The decision in *Green* v. *Clark* is entirely consistent with the other decisions of this Court noted in *Universal Land Security Company* v. *Jackson* (1917), 1 W. W .R. 1352, at p. 1353, where exceptions are suggested. The principle is that where there is substantial compliance and the comparatively small defect in complete compliance has arisen without bad faith, the Court will permit its being compensated for, or—what is better—where it can be done, by complete compliance within a reasonable time. Here the vendor offered what is better than compensation, namely, literal fulfilment, &c., &c."

In *Green* v. *Appleton*, 25 D. L. R. 533, it was argued by appellants' counsel that until completion there are only two courses open to the purchaser:

(a) to perform his contract by payment; or

(b) to repudiate.

[1] 1917, 3 W. W. R. 93.

The fallacy of this is pointed out by Harvey, C.J.: The purchaser can, of course, simply decline to pay until the vendor shows a good title; this is not repudiation.[8]

The general principle that the vendor must be in a position to make a good conveyance at the time fixed for completion is emphasized in:—

Robinson v. *Moffatt*, 25 W. L. R. 465 (*cf. Re Bryant*, 44 C. D. 218; *Re Thompson and Holt*, 44 C. D. 492; *Re Head's Trustees*, 45 C. D. 310).

Rescission—An Extra-judicial Remedy—Declaratory Judgment.

Ante, p. 56.

In *Wilson* v. *Abbott*[9] (Sask.), Lamont, J., allowed the plaintiff a declaration that the contract was at an end, and no longer affected his land. He says: "I can, however, see that where land has been purchased under an agreement of sale, which agreement provides for its determination under certain conditions, a *declaratory* judgment that the agreement has been duly determined may be a convenient way of placing beyond dispute the question whether or not it still attaches to the vendor's title." The learned judge reached this conclusion "not without some doubt." However in *Moore* v. *Stewart*[10] the same learned judge says:—"A valid cancellation of an agreement of sale . . . carries with it certain consequences both to the vendor and purchaser. The vendor having put an end to the contract cannot sue for the purchase money, nor is he entitled to ask the court to determine the contract, he having determined it himself. He is in my opinion, as I held in *Wilson* v. *Abbott* (*supra*), entitled to an order declaring that he had validly determined the contract, and that it therefore no longer affected his title."

[8] It is submitted that under some circumstances refusal to pay may amount in effect to repudiation.

[9] 6 W. W. R. at p. 1089.

[10] 7 W. W. R. at p. 993.

Rescission—Executed Contract.

Ante, p. 158.

The somewhat difficult question whether a contract completely executed can be rescinded except for fraud is dealt with in *Franz* v. *Hansen* (1917, 3 W. W R. 77),[1] and *cf. Anderson* v. *Morgan* (1917, 2 W. W. R. 969); *Cole* v. *Pope*, 29 S. C. R. 291. See also Morison on Rescission of Contract, p. 143; *cf. Armstrong* v. *Jackson* (1917), 86 L. J. K. B. 1375, at 1377; *Freeman* v. *Calverley*, 34 W. L. R. 514; *Greig* v. *Franco Canadian Mortgage Coy.*, 10 W. W. R. 1159.

Rescission for breach of covenant, or guarantee to make improvements, lay water mains, &c. In connection with subdivisions, lots in which are offered for sale to the public, the vendor sometimes represents, warrants, or covenants, by advertisement or otherwise, that streets will be paved, light, water, sewers extended to the properties, &c., &c. A complicated case of this sort arose in connection with sales of lots in the Hudson Bay Reserve at Edmonton in 1914; but a settlement was effected between the vendor and the purchasers. The subject is discussed in *McMillan* v. *American Subdivision Corp'n* (Tennessee), L. R. A. (1917) D. 401; and in the careful annotations to this report.

Relief from Forfeiture.

Ante, pp. 92-127.

There have been several important cases involving the question of time of the essence.

(a) *Stickney* v. *Keble* (H. L. E.).[2]

This was an action by the purchaser to recover the deposit paid by him on an agreement of sale. The agreement was dated and deposit paid in June, 1911. October 14th was the date fixed for completion. The defendants (vendors)

[1] While the book is in press the judgment of the Supreme Court of Canada is reported [(1918), 2 W. W. R. 40]. The appeal was allowed. The Court held that after completion of the conveyance a purchaser cannot recover damages for a deficiency in acreage, unless the number of acres had been warranted, in the circumstances to support an action for deceit, differing from the Appellate Court (Alberta). The Court finds that no warranty in intention or in fact was disclosed in the evidence.

[2] 1915 A. C. 386.

delayed completion in order simultaneously to complete their title to this and other lands.

On 14th November, 1911, the purchaser gave notice that he would cancel the contract unless it was completed in three weeks; but this he subsequently *waived*. On 12th December he gave another notice requiring completion by 12th January, 1912, but this also was *waived*; on 30th January he gave a third notice requiring completion on or before February 13th.

The vendors having failed to complete within the last limited time, the purchaser brought this action. It was held that there had been unnecessary delay in completion, and that under the circumstances the time limited by the last notice was sufficient, and that the plaintiff was entitled to call the contract off and recover his deposit.

There was no stipulation in the contract making time the essence.

No new development of law appears to be established by the judgments.

Earl Loreburn says (p. 400): "That the date fixed for completion in a contract for the sale of land is no less a part of the contract than any other clause, but equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect."

Lord Atkinson says (p. 401): "There is no occult or elusive mystery hidden in the phrase 'in equity time is not of the essence of the contract.' It merely expresses in a condensed form the doctrine that if a Court of Equity looking not to the letter but to the substance of a contract to purchase land see that in none of the three ways above mentioned [a] is an intention disclosed that the time limit for completion is to be strictly adhered to, the Court will relieve against breaches through mere lapse of time, when that can be done without substantial injustice. *Roberts* v. *Berry* (3 D. M. & G. 284). The jurisdiction exercised by a Court

[a] Time not of essence by express stipulation; nor by reason of the nature of the property; nor by circumstances of the case.

of Equity in this matter is very much akin to that exercised by it in relieving against forfeiture, or in permitting the redemption of mortgage after the estate of the mortgagor has according to the letter of his contract become absolute in law." He then quotes the passages from the judgments of Lord Cairns and Rolt, L.J., in *Tilley* v. *Thomas* (L. R. 3 Ch. 61), cited *ante* p. 112.

Lord Parker of Waddington says (415): "Where it (equity) could do so without injustice to the contracting parties it decreed specific performance notwithstanding the failure to observe the time fixed by the contract for completion. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to contracts in which the stipulation as to time could not be disregarded without injustice to the parties, when for example *the parties for reasons best known to themselves* had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract."

Ante, p. 113.

The case however is of importance in interpreting s. 25, s.-s. 7 of the Judicature Act, 1873.

Counsel for the respondents argued that under this section it is only necessary to consider whether, at the date of the institution of the action, time would in equity have been considered of the essence, and that the subsequent act of the vendor, whereby he put it out of his power specifically to perform the contract, was immaterial.

On this Lord Parker of Waddington says:—"My Lords, I cannot give to the section in question the interpretation for which the respondents contend. It means, in my opinion, that where equity would prior to the Act have, for the purposes of decreeing its own remedies, disregarded a stipulation as to time and restrained an action at law based on

the breach thereof, the Courts constituted by the Act are for the purpose of giving common law relief to disregard it in like manner. In considering whether it would give relief by restraining proceedings at law, the Court of Chancery took cognizance of everything which had happened up to the date of the decree, and in applying s. 25, sub-s. 7 of the Act, everything up to the date of judgment ought, in my opinion, to be similarly taken into account. The section cannot in my opinion mean that the rules as to time laid down by Courts of Equity in certain cases, for certain cases, and under certain circumstances only, shall be applied generally and without enquiry whether the particular case, purpose, or circumstances are such that equity would have applied the rules. If since the Judicature Acts the Court is asked to disregard a stipulation as to time in an action for common law relief, and it be established that equity would not under the then existing circumstances have prior to the Act granted specific performance or restrained the action, the section can, in my opinion, have no application, otherwise the stipulation in question would not, as provided in the section, receive the same effect as it would prior to the Act have received in equity.

The case, however, recognizes the right of one of the parties by a *reasonable notice* [4] to make time of the essence; and it may be of importance to note that though two separate such notices had been given, and waived, this did not deprive the purchaser of his right to give another notice making time of the essence (see *Brickles* v. *Snell*, *post*, p. 291).

(b) *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*.[5] This case involved the interpretation of section 55 of the Indian Contract Act, 1872, viz.:—"When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the

[4] Cf. *Goodchild* v. *Bethel*, 30 W. L. R. 280.
[5] P. C. 32 T. L. R. 156.

contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract." It is unnecessary to give the facts in detail, and for our purpose the following summary is sufficient." The date fixed for completion was within two months from the date of the contract. More than two months had expired when the plaintiffs made a requisition on title, giving a proper one apart from the question of its time. The defendant relying on the above section asserted his right to put an end to the contract on the ground that time was of the essence." Their Lordships did not think that that section laid down any principle which differed from those which obtained under the law of England as regarded contracts to sell land. Under that law equity, which governed the rights of the parties in cases of specific performance of contracts to sell real estate, looked not at the letter but at the substance of the agreement, to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended no more than that it should take place within a reasonable time. The principle was well expressed in what Lord Redesdale said in his well-known judgment in *Lennon* v. *Napper* (2 Sch. and Lef. 682), which was adopted by Lord Justice Knight-Bruce in *Roberts* v. *Berry* (3 De G. M. and G. at p. 289). The doctrine laid down in these cases was again formulated by Lord Cairns in *Tilley* v. *Thomas* (L. R. 3 Ch. 61), and by the House of Lords in the recent case of *Stickney* v. *Keeble* (1915), A. C. 386). Their Lordships were of opinion that that was the doctrine which the section of the Indian Statute adopted and embodied in reference to sales of land. Their Lordships would add these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract were to be taken as having really and in substance intended as regards the time of its performance might be excluded by any plainly

expressed stipulation. But to have that effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the prescribed time limits *in a fashion which was unmistakable.* The language would have that effect if it plainly excluded the notion that those time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation."

Relief from Forfeiture.

Ante, p. 117 et seq.

Those of us who fondly hoped that the decision of the Judicial Committee in *Kilmer* v. *B. C. Orchards, &c.*[6] had gone a long way towards settling the law as to the right of a purchaser to be relieved from forfeiture (though the decision does not indicate, much less define, the *nature* of the relief to be granted) have been sadly disappointed by later decisions of the Board.

In *Drinkle* v. *Steedman*,[7] a Saskatchewan case, the material facts were as follows:—The agreement of sale was dated the 9th December, 1900, purchase price $16,000, payable $1,000 cash, $1,000 first December, 1910, and the balance in five equal annual instalments of $2,800 each. It contained the usual clause to the effect that the vendor should be at liberty after default in any payment, without notice to the purchaser, either to cancel the contract and retain payments by way of liquidated damages, or to proceed to another sale and to recover the deficiency, if any. The cash payment was made, but the next payment due on the first of December, 1910, was not paid by the plaintiffs. On the 15th of December, the defendant, through his solicitor, wrote the plaintiffs declaring the agreement null and void, and this notice was received on the 2nd of December. On the same day, the plaintiffs remitted to the defendant

[6] (1913) A. C. 318.
[7] 26 W. L. R., p. 127.

by bank draft the sum of $1,954.26, the amount of the payment due first December, with interest to the 31st of December. The defendant refused to accept it. On the 30th of January, 1911, the plaintiffs again tendered the amount due, which was again refused. The plaintiffs then instituted this action for specific performance, or, in the alternative, damages.

The trial Judge, Newlands, J., following *Steele* v. *McCarthy*,[8] a decision binding on the Saskatchewan Court, held that he could not relieve the plaintiffs from the forfeiture of their interest in the land.[9]

The plaintiffs appealed, and in the meantime the Judicial Committee had given their decision in *Kilmer* v. *British Columbia Orchard Lands Company*.[10]

The appeal came on for hearing before Haultain, C.J., Johnstone, Lamont and Brown, JJ. It was held, "That the Court has jurisdiction to relieve a purchaser from the *forfeiture of his interest in the land* itself as well as from the *forfeiture of the purchase money paid*, and that *Steele* v. *McCarthy* upon that point must be considered overruled." Finding that the plaintiffs had promptly remedied their default, had been prompt in applying to the Court for relief and guilty of no laches, they were held entitled to specific performance. "The appeal should, therefore, in my opinion be allowed. A reference should be had to the local registrar to ascertain the amount due to the defendant under the agreement; and upon payment of that amount by the plaintiffs they will be relieved from the forfeiture occasioned by their default and the defendant's notice."

The Supreme Court of Saskatchewan thus fell into line with the Courts in Alberta and Manitoba.

[8] 1 Sask. L. R. 317.
[9] See 26 W. L. R., at p. 127.
[10] (1913) A. C. 317.

The defendant appealed direct to the Privy Council. The judgment of the Board (Viscount Haldane, Lord Parker of Haddington and Lord Sumner) was delivered by Viscount Haldane. He says:—"The Supreme Court (*i.e.* of Saskatchewan) held that the case was governed by the decision of this Board in *Kilmer* v. *B. C. Orchard Lands Company* (1913), A. C. 319, in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty and should be relieved against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it *believed* to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture."

Lord Haldane then proceeds: "As to the relief from forfeiture, their lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing Mr. Justice Newlands' judgment. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though the literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach."

He then argues that since, in the *B. C. Orchards case*, the company had extended the time for payment of the instal-

ment which was not paid, the Board "must (*sic*) have considered" that the stipulation as to time being of the essence had been waived. He says: "The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their lordships appear to have adopted this view, and on that footing alone (*sic*) to have decreed specific performance as counterclaimed."

"In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the Court below was, in the present case, right in holding that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their lordships are of opinion that there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, *be relieved from forfeiture of the sums paid by them* under the agreement as proposed by the learned judge who tried the case. *For this purpose the respondents should have liberty to apply to the court of first instance.* For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the courts below. Their lordships will humbly advise His Majesty accordingly."

This decision [1] of the Board appears to establish, (1) That under a clause making time of the essence, the moment the purchaser makes default in payment of an instalment of purchase money the vendor may determine (or rescind) the agreement; the purchaser *forfeits his interest in the land.* He can no longer claim specific performance no matter how promptly he remedies his default, or how promptly he applies to the Court for relief. (2) Nevertheless the purchaser is entitled to be "relieved" from the *forfeiture of*

[1] Commented on and applied in *Price* v. *Ruggles* (Man.), 1917, 2 W. W. R., at 1042.

the money paid. The Board does not suggest just how. "For this purpose the respondents should have liberty to apply to the Court of first instance." If the money paid by the purchaser is ordered re[illegible] to him and the vendor gets the land, this is simply *rescission* pure and simple on the demand of the *purchaser in default! invito domino* (the vendor) who the Board professes to hold entitled to stand on his strict rights.

In *Brickles* v. *Snell*,[2] an Ontario case, the material facts were as follows:- The action had been brought in the Supreme Court of Ontario by the respondent against Isaac Brickles, since deceased, for specific performance of an agreement dated the 20th of February, 1912, for the sale of certain lands in Ontario purchase price $7,500; $500 deposit on entering into the agreement; $2,000 on the acceptance of title and delivery of conveyance, the balance, $5,000, to be secured by mortgage executed by the respondent on the property purchased, "to be drawn on the vendor's solicitors' usual form." The agreement contained certain special clauses:- (1) The vendor would not have to furnish any abstract of title or deed, or evidence of title except such as were in his possession. (2) The purchaser to search the title at his own expense within ten days and if no objection in writing within that time, he was deemed to have accepted the title. (3) If any objection was made within the time, the vendor was to have reasonable time to remedy it. (4) In case the purchaser should make default in completing the purchase "in the manner and at the time mentioned," i.e. March the 15th, 1912, any money theretofore paid on account might, at the option of the vendor, be retained as liquidated damages, and the contract at his option be put an end to, the vendor being entitled to re-sell the lands without reference to the purchaser. (5) *Time in all respects to be strictly of the essence of the contract.*

[2] 1916. 2 A. C. 599.

The purchaser's solicitor did not prepare the deed of conveyance. The vendor's solicitor took the matter in hand and the purchaser and his solicitor apparently acquiesced in this arrangement. On 21st of February, 1912, the vendor's solicitors submitted a draft deed for approval by the purchaser's solicitor. On February 27th the vendor's solicitors wrote to the purchaser's solicitors asking them to return the draft deed herein, approved, with their objections (if any) to title. The purchaser's solicitors commenced the examination of the vendor's title on the 22nd of February, 1912, and had it actually completed on the 29th of that month, when they had received the letter from the vendor's solicitors, dated February 27th, 1912. By the first week of March, they had completed the searches and were ready to accept the title except for one matter to be cleared up,—the existence of an undischarged mortgage, in regard to which they had spoken to the vendor's solicitors over the telephone on March the 5th, which they required to be discharged. The vendor's solicitors replied that they would have it discharged on closing. On March the 12th the vendor's solicitors telephoned to the purchaser's solicitors that March the 15th was the day for closing and asked for the return of the draft deed. This was agreed to, the vendor's solicitors undertaking to have the mortgage discharged. The member of the firm of the vendor's solicitors, who had been attending to the matter, was taken ill on the 14th, and was unable to attend to the matter again until Monday, the 18th, when he telephoned to the purchaser's solicitors, stating that they were ready to close the matter. The purchaser's solicitors replied that they had been ready to close on the 15th, but that the purchaser now refuses to carry out the agreement.

The trial judge, Sir Glenholme Falconbridge, C.J., held that the purchaser was *not in default*, that the clause as to time being of the essence did not apply and granted specific performance. The Ontario Appellate Court set aside this decree and dismissed the action. The Supreme Court of

Canada, the Chief Justice and Anglin, J., dissenting, reversed this decision and ordered the judgment of the trial judge restored. The majority of the Supreme Court of Canada fell into the same error, so says in effect the decision of the Judicial Committee on further appeal, as the Supreme Court of Saskatchewan did in *Steedman* v. *Drinkle;* they "expressly held that the case was governed by the decision of this Board in the case of *Kilmer* v. *British Columbia Orchard Lands Company* (1913), A. C. 319."

By special leave the vendors appealed from the judgment of the Supreme Court of Canada to the Privy Council. The judgment of the Board (composed of The Lord Chancellor, Viscount Haldane, Lords Atkinson, Shaw and Parmoor) was delivered by Lord Atkinson.

After giving a *resumé* of the facts, Lord Atkinson points out that "The Court (*i.e.* the Supreme Court of Canada) had not, of course, the advantage of having before it the judgment of this Board in the more recent case of *Steedman* v. *Drinkle and another,* delivered on December 21, 1915, (1916) A. C. 276, in which the former case was explained, and it was pointed out that in it their Lordships must have been of opinion that the stipulation as to time being of the essence of the contract did not apply as the facts stood, since the defendant company had themselves agreed to extend beyond the day fixed the time for the payment of the instalment of the purchase-money, the non-payment of which by Kilmer they relied upon as entitling them to enforce the forfeiture."

He then proceeds: "This was the feature which distinguished that case from the later case of *Steedman* v. *Drinkle and another.* In the latter the purchaser made default in the payment of an instalment of the purchase money. The vendor did not give any further time for the payment of it; on the contrary, he took advantage of the default immediately and cancelled the agreement. The Board decided that as time was expressly made the essence

of the contract, specific performance of it could not be decreed in favour of the purchaser who was in default; but held that the *forfeiture of the money paid*[1] under the contract was a penalty from which relief might be granted on proper terms. Faced with these difficulties, Mr. Tilley, counsel for the respondent, abandoned the grounds upon which the decision appealed from was based by the Supreme Court, but stoutly contended that the vendor was not entitled to treat the purchaser's omission to close the transaction on March 15, 1912, as a default, giving him, the vendor, the right to rescind, as the latter was not at that time ready (*i.e.* able) and willing to convey to the purchaser the fee of the property sold, inasmuch as, first, he had not before that day paid off and discharged the then existing mortgage on the land, and procured the legal estate in the lands to be revested in him; and, second, as the vendor's solicitor's form of mortgage had never been delivered or tendered to the purchaser to enable his own solicitors to prepare the mortgage deed, by which the balance of the purchase money was to be secured to the vendor."

Lord Atkinson (for the Board) then holds that it was the duty of the respondent to have the mortgage prepared; and then proceeds to a long and elaborate argument to show that the vendor was not bound to have the mortgage discharged and the legal estate actually revested in him before March 15th, 1912, the date for completion.

The judgment then reviews the cases of *In re Head's Trustees and Macdonald*, 45 Ch. D. 310; 59 L. J. Ch. 604; *Esdaile* v. *Stephenson*, 6 Madd. 366; *Brewer* v. *Broadwood*, 22 Ch. D. 105, 52 L. J. Ch. 136; *Bellamy* v. *Debenham* (1891) 1 Ch. 412; *Sprague* v. *Booth* (1909) A. C. 576, and concludes as follows: "These authorities do not, in their lordships' opinion, support the respondent's contention on this point. They think he has failed to show that the vendor was not, in fact, on March 15, ready, *i.e.* able

[1] See *ante*, pp. 92 *et seq.*

to convey the property purchased. They think, therefore, on the whole, that the appeal succeeds, that the decree appealed from was erroneous and should be reversed, and the decree of the Supreme Court of Ontario, dated March 18, 1913, restored. And they will humbly advise His Majesty accordingly. The respondent must pay the costs here and in the Supreme Court of Canada."

The purchaser seems to have made an effort at the eleventh hour to be relieved from the forfeiture of his deposit of $500. This is disposed of, not on the *principle* that it is only where the contract goes off without any fault of the purchaser that he can recover his deposit, but on a mere technicality of pleading. Lord Atkinson says: "It is, their lordships think, very unfortunate that a claim in the alternative was not inserted for a return of the deposit of 500 dollars, or that, if not originally claimed, liberty should not have been asked to amend the pleadings by inserting such a claim, so that there might have been a complete adjudication on all matters in dispute between the parties, and all further litigation have been prevented. That, however, has not been done, and their lordships therefore can only deal with the issues raised by the pleadings as they stand."

Apparently, if the pleadings had only asked for it, Lord Atkinson and the Board were prepared to order the *deposit* repaid to the purchaser they found to be in default, and disentitled to specific performance. That would have been "relief from forfeiture" with a vengeance, contrary alike to principle and to practically all the decided cases whether in law or in equity.[1]

Brickles v. *Snell*, then, adds apparently only one point to the decision of the learned Board in *Drinkle* v. *Steedman*, and it is this:—

Where time is declared of the essence, the slightest default on the part of the purchaser in observing this stipu-

[1] See *ante*, p. 50; and cases cited in *note* (3).

lation, even when occasioned by *vis major*, will at the vendor's option work a forfeiture of the purchaser's *interest in the land;* and *semble*: that where the contract goes off *even though by reason of the default of the purchaser*, he is entitled to recover any deposit he may have paid, if only he claims it in his pleadings!!

These decisions, *Drinkle* v. *Steedman* and *Brickles* v. *Snell*, of the Board, are hard to reconcile with the *principles* underlying rescission and determination or "avoidance" (see Morison on Rescission, etc., p. 10) of contracts and relief from forfeiture, they appear to be quite contrary to a long series of decided cases.

Purchaser's Action for Damages.

Ante, pp. 153 et seq.

The recent tendency of the Courts appears to be to relax the severity of the rule in *Bain* v. *Fothergill*.[5] *Bain* v. *Fothergill* and other cases (referred to *ante* pp. 153-156) are commented on and explained by Sargant, J., in *Re Daniel*.[6] In this case the property was subject to a mortgage for £5,000, which covered other property[7] of the vendor's as well; the purchase money was only £1,000. The vendor was unable to procure a separate release of the mortgage in respect of the parcel in question, although "but for the lack of pecuniary means" to pay off the whole £5,000, he was in a position to force the concurrence of the mortgagee.

The purchaser was held to be entitled to general damages for the loss of his bargain. This striking passage occurs in the judgment: "It seems to me that these cases[8]

[4] There is an article by Cyprian Williams in Law Notes for February, 1916, and cf. *Keck* v. *Faber*, 59 Sol. Jl. 253.

[5] 33 T. L. R. 503; cf. *McEachern* v. *Carey*, 10 A. L. R. 478.

[6] Cf. *Knight* v. *Cushing* (2 W. W. R. 704; 22 W. L. R. 220; 46 S. C. R. 555), and *see ante*, p. 23 *et seq.*

[7] i.e., *Day* v. *Singleton*, *Engel* v. *Fitch*, etc.

establish that contracts for the sale of real estate, like other contracts for sale, cast on vendors a general liability for damages for non-fulfilment of contract, *subject only to one exception* in a very special and limited class of cases, and that unless a case is brought within that special class the general rule applies."

Waiver, &c.

Ante, pp. 191 et seq.

Where the vendor elects to proceed for specific performance he cannot later claim rescission by serving a notice under the terms of the contract. *Foster* v. *Goodacre* (B.C.).[8]

Greig v. *Franco-Canadian Mortgage Company* may be referred to. The facts as found by the trial judge (Hyndman, J.) are set out in his judgment;[9] the reasons for judgment in the Appellate Division[10] were delivered by Scott, J. and Stuart, J.; and in the Supreme Court of Canada,[1] reasons for the judgment of the Court were delivered by Duff, J. Brodeur, J., gives his reasons for dissenting.

The case was really decided, and is very important, upon the actual and ostensible authority of an agent in the purchase of lands for his principal; but in this respect is beyond the scope of my book.

Hyndman, J., decided the case on the ground of mutual mistake; but in the Appellate Division, Stuart, J., does discuss the question of waiver. In this aspect of the case, Stuart, J., accepts the finding of the learned trial judge; and deals with the question from the position as defined by himself, as follows:—"The position then is that the plaintiff's agent Cassells had notice of the reservation before the contract was executed, and their solicitor, Mr. Woods, as I interpret the language of the learned trial judge, knew of the reservation before he paid over the second instalment."

[8] 1917, 2 W. W. R. 636.
[9] 32 W. L. R. 280.
[10] 34 W. L. R. 1102.
[1] (1917) 2 W. W. R. 121.

He then proceeds:—"In my opinion, neither of these circumstances can affect the plaintiff's right to insist upon the *covenant* which the defendants gave him. It was decided in *Christie* v. *Taylor*, a judgment of my own, but sustained on appeal and not reported, that the purchaser is not bound to search the title where he has secured a covenant from the vendor. He is entitled to rely upon that covenant. I think that the law goes farther and that even though the purchaser knows at the date of the agreement of some defects in title, or learns of it afterwards, yet he may rely upon the purchaser's express covenant to give him a good one, and only a new agreement can *disentitle him* to it. It would indeed be strange if a party by performing his own part of a contract with knowledge that the other could not perform some part of his, should thereby deprive himself of the right to insist on the other performing what he had agreed to perform."

In the Supreme Court of Canada,[1] Duff, J., dealt with the case solely as a question of agency law; while Brodeur, J., gave reasons for agreeing with and confirming the judgment of the trial judge.

The learned judge's* statement that the purchaser is entitled to rely upon the vendor's covenant can be accepted at once; a covenantee is always entitled to rely upon the covenant; but it is respectfully submitted that the conclusion that "a party performing his part of a contract with knowledge that the other could not perform some part of his," while not depriving the former of his right to rely on the covenant, entitles the covenantee to *rescind* the contract is a *non sequitur*. It is respectfully submitted that having inserted the covenant he is not only *entitled* to "rely" on it, *he is bound* to "rely" on it. This necessarily involves and involves only the consideration of the *remedies* of a covanantee for *breach* of covenant for title. I propose at least to *argue*[1] that he is not entitled to *rescind*.

[1] 1917, W. W. R. 121.

* *i.e.*, Stuart, J.

[1] Thought I was counsel for the defendant in this case, this question is now, of course, purely an academic one.

A covenant for title in the *agreement* of sale seems to be a peculiarity that has crept into the practice of western conveyancers—it is in fact rather an anomaly.

Even under an open contract the vendor is obliged to show a good title; and, as we have seen, the purchaser can ordinarily rescind as soon as he finds that it is impossible for the vendor to make a good title. It is submitted that the insertion of the covenant for title in the agreements adds nothing to this right to *rescind*; it may be, on the contrary, that it detracts from it. It is not the practice of English conveyancers to insert in the agreement such a covenant, as the one referred to by Stuart, J., in *Greig* v. *Franco Canadian Mortgage Company* (*ante*, 298).

In the standard form of agreement given in Williams on V. & P. (2nd ed., Appendix B, p. 1350), this is how the clause for completion reads: "Upon such payment the vendor and all necessary parties (if any) will execute a *proper* assurance of the property to the purchaser." It is true that the purchaser is entitled to have inserted in the *conveyance* the *usual* covenants for title (Williams, p. 46), viz.: covenants for right to convey, quiet enjoyment, freedom from encumbrances, and for further assurances, *extending to indemnity against anything done, omitted or knowingly suffered by the vendor or his predecessors in title*, back to and including the last person who became entitled to the property on a *sale*, &c.; but the vendor is not bound in the absence of express stipulation to give any manner of warranty of title other than is afforded by these qualified covenants (Williams, p. 653).

Where the purchaser has to be protected against an adverse estate, interest or claim, both parties wishing to permit the sale to go through, the thing can be arranged by the vendor giving an *absolute* covenant for title if the purchaser is willing to accept it. (See Williams, 1136): then in case of lawful eviction or disturbance, the purchaser can "rely upon that covenant" and resort to the legal remedy for breach of covenant, *i.e.*, *an action for damages*.

Now it is submitted that, so far as the *remedy* is concerned, it makes no difference whether the absolute covenant is contained in the agreement of sale or in the conveyance. In these instalment-plan agreements, such as was under consideration in *Greig* v. *Dominion Mortgage Company*, the only logical reason for inserting such a covenant seems to be for the express purpose of *preventing* the rescission of the contract by the purchaser, i.e., it assumes that the purchaser, while recognizing that the vendor may be unable to clear up all defects of title before the time for completion arrives, is nevertheless willing to take the property and pay the instalments of purchase money in the meantime, *relying* on the vendor's covenant by way of indemnity against the adverse outstanding interests.

In England, under the Conveyancing Act of 1881, the Court may permit payment into Court to provide for the amount of the incumbrance (where it is a mortgage, lien or charge) with future costs, expenses and interest, but will not *force* this on the vendor, where the amount exceeds the purchase money; but perhaps a different result would be reached where the vendor has given an absolute covenant for title. It is submitted further that to the extent that the purchaser may require to be and can reasonably be indemnified against an adverse interest or estate, the same principle should be adopted, where the purchaser is willing to take the estate, with a present defective title, relying upon the vendor's absolute covenants for title.

In connection with the general question of rescission, where before conveyance the purchaser in possession is disturbed or ejected by one claiming under title paramount to the vendor's: Note (*f*) p. 1137 of Williams on V. & P. is very important. He says: "Here it may be noted that if, before the conveyance has been fully executed, either the vendor or the purchaser, having been let into possession, be ejected by anyone claiming under a title paramount to the vendor's, the purchaser can recover any purchase money already paid by him and resist payment of any part of the

price that remains unpaid, notwithstanding that he had accepted the title, and that under the vendor's covenants for title he would have had no guarantee of indemnity against the ejector's rights: *Cripps* v. *Reade*, 6 T. R. 606 (as to which, see above, p. 1133); *Johnson* v. *Johnson*, 3 B. & P. 162; Sug. V. & P. 549. The reason of this is that the lawful ejectment of the vendor, or of the purchaser holding possession with the vendor's assent, before completion, makes it impossible for the vendor duly to fulfil the agreement by conveying the land with the right to possession. The vendor, therefore, is obliged to commit such a breach of the contract as entitles the purchaser to rescind it and to recover all sums paid on account of the price: see above, pp. 578, 609-611, 1037-1039, 1050-1052. If, however, the purchaser had agreed to buy such interest or title as the vendor had (see above, pp. 202, 646), he would be bound to perform the contract, and could not recover any purchase money paid or resist payment of the price, although the vendor, or he himself having been let into possession, were ejected by title paramount before the contract had been completed by conveyance: *Early* v. *Garret*, 9 B. & C. 928; and see *Best* v. *Hammond*, 12 Ch. D. 1; above p. 204. As to the purchaser's duty in such a case to perform the contract specifically, see *Kenney* v. *Werham*, 6 Madd. 355; *Wilkinson* v. *Torkington*, 2 Y. & C. Ex. 796; Fry, Sp. Perf. §§ 914-921, 3rd ed."

ADDENDUM.

To the summary of the result of the decision of the Judicial Committee in *Drinkle* v. *Steedman* (*ante* pp. 290, 291), ought perhaps to be added that this decision seems definitely to destroy the authority of *Barclay* v. *Messenger* (43 L. J. 449), in which Jessel, M.R., held that where by an agreement time is originally of the essence an extension of time to another definite date makes the substituted time also of the essence. (Cf. Stuart, J., in *Wilson* v. *Patterson* (1918), 1 W. W. R. at p. 1003).

Walsh, J., acted on this view of *Drinkle* v. *Steedman* in *Tooley* v. *Hadwen*, 1918, 2 W. W. R. at p. 817. He says: "I think the effect of the judgment in the *Kilmer case*, as explained in the *Steedman case*, is not only to question but to destroy the authority of *Barclay* v. *Messenger* upon this point.

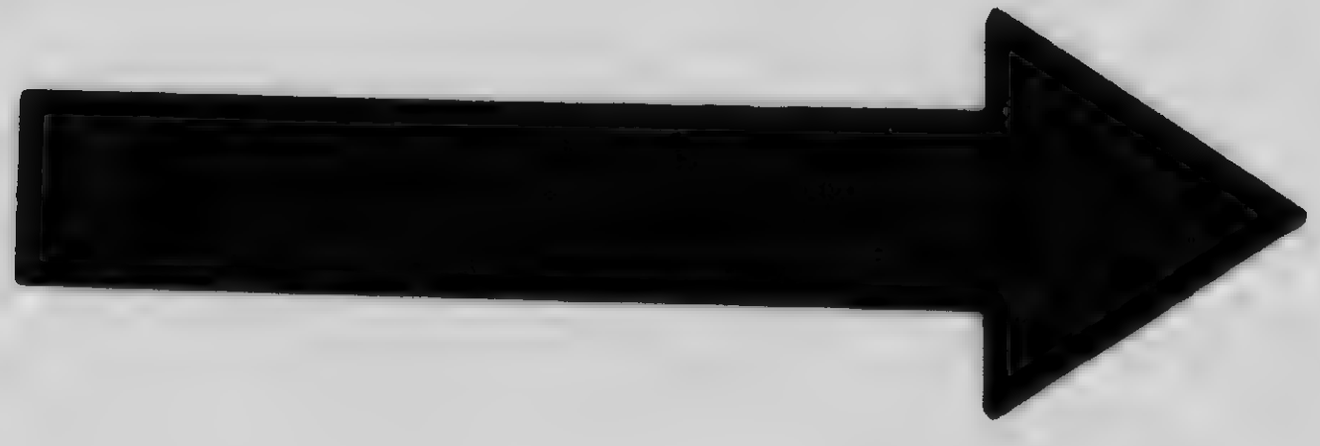
* * *

The Judicial Committee restored the judgment of the trial judge who had decreed specific performance of the contract by the plaintiffs as prayed by the defendant in his counterclaim. The judgment of the Board upon this branch of the case gives absolutely no reasons for the conclusion thus reached. . . .

The argument of Kilmer's counsel was that "as they (the company) had submitted to postpone the day of enforcing payment they were no longer entitled to say that time was of the essence of the contract. The rigid date having been altered they were not entitled to say that the substituted date was rigid to the extent of being unalterable." So that the precise point determined by *Barclay* v. *Messenger*, *supra*, was undoubtedly before the *Board*. The Judicial Committee was of course confronted with this judgment when it came to deal with the *Steedman case*, *supra*, and this is how Viscount Haldane explained it at p. 280 (1916) 1. A. C.: "But the Board went on to decree specific per-

formance. As time was declared to be of the essence of the agreement *this could only have been* decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view and on that footing alone to have decreed specific performance as counterclaimed."

Under this authoritative explanation of the Kilmer judgment I think that I am bound to hold upon the facts of this case that the vendor cannot insist that time was of the essence with respect to this overdue interest. . . . And so applying the principle of *Kilmer* v. *British Columbia Orchard Lands, Ltd.* *supra*, as I understand it, to the facts of this case, I must hold that the contract is still on foot.



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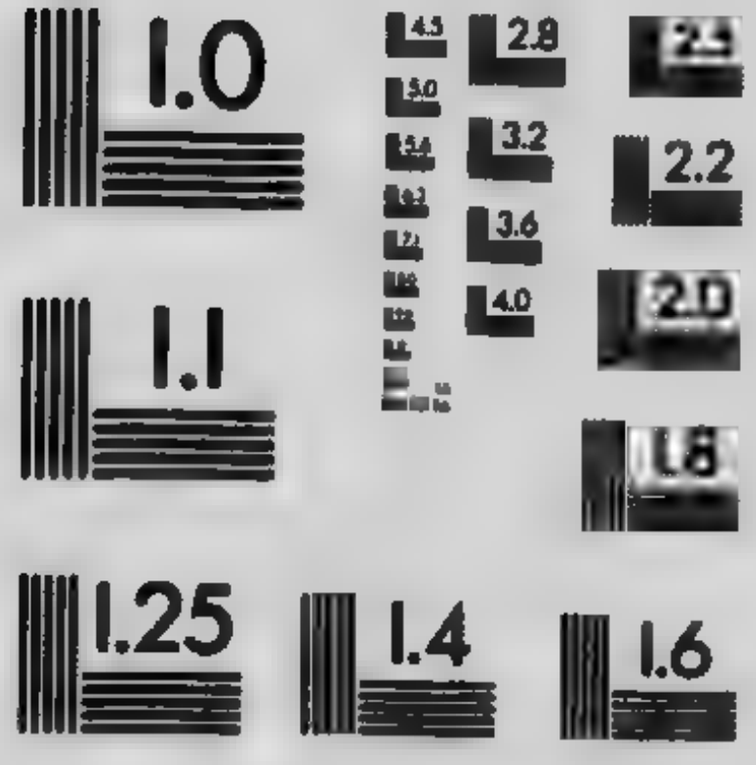

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